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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

IN RE: RICHARD SCHELLER,

Petitioner

On Petition for a Writ of Extraordinary Relief to the Texas Supreme Court and the Honorable Leonard Saenz, Associate Judge for Travis County, Texas

PETITION FOR EXTRAORDINARY RELIEF

CECILIA M. WOOD,
ATTORNEY AND
COUNSELOR AT LAW, P. C.
1122 Colorado Street,
Suite 100B
Austin, Texas 78701
(512) 708-8783
Cecilia@ceciliawood.com

Counsel for Petitioner

QUESTION PRESENTED

Question 1: Must the *Troxel* analysis be applied to all facets of a case which burden the decision making authority of a parent or only to the ultimate grant of relief? *See Troxel v. Granville*, 530 U. S. 57; 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (*plurality op.*).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Relator is Richard Scheller. Respondent is the Honorable Leonard Saenz, Associate Judge, Travis County, Texas. The Real Party in Interest is William Pemberton. Pursuant to Rule 29.6, Petitioner affirms that there is no party to the controversy that is a corporation.

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PETITION FOR EXTRAORDINARY RELIEF

OPINIONS BELOW

The opinion of the Texas Supreme Court is reported at *In re Scheller*, 325 S.W. 3d 640 (Tex. 2010, r'hg. denied 12/10/10)(per curiam); App., *infra,* 1a-13a. The denial of the Motion for Rehearing and the Motion to Reinstate the Stay was not published. *In re Richard Scheller*, 2010 Tex. LEXIS 969; App., *infra,* 14a. The opinion of the Third Court of Appeals was a memorandum opinion and was also unpublished. *In re Scheller*, 2009 Tex. App. LEXIS 10070 (Tex. App. – Austin 2009); App., *infra,* 44a-45a. As is the practice in Texas State Court, the verdict or order of the trial court was not reported. *App., infra,* 15a-26a.

JURISDICTION

The opinion of the Texas Supreme Court was rendered on the November 5, 2010 and a timely petition for rehearing was denied on December 10, 2010. This Court's jurisdiction rests on 28 U. S. C. §1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution reads in relevant part:

"...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws." U. S. Const. amend. XIV, § 1.

The challenged portions of the Texas Family Code which control this case are as follows:

> " (a) A biological or adoptive grandparent may request possession of or access to a grandchild by filing:
> (1) an original suit; or
> (2) a suit for modification as provided in Chapter 156.
> (b) A grandparent may request possession of or access to a grandchild in a suit filed for the sole purpose of requesting the relief, without regard to whether the appointment of a managing conservator is an issue in the suit."
> Tex. Fam. Code §153.432 (2009).

> "The court shall order reasonable possession of or access to a grandchild by a grandparent if:
> (1) at the time the relief is requested, at least one biological or adoptive parent of the child has not had that parent's parental rights terminated;
> (2) the grandparent requesting possession of or access to the child overcomes the presumption that a parent acts in the best interest of the child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being; and
> (3) the grandparent requesting possession of or access to the child is a parent of a parent of the child and that parent of the child:

(a) has been incarcerated in jail or prison during the three-month period preceding the filing of the petition;
(b) has been found by a court to be incompetent
(c) is dead; or
(d) does not have actual or court-ordered possession of or access to the child."
Tex. Fam. Code §153.433 (2009).

" A biological or adoptive grandparent may not request possession of or access to a grandchild if:
(1) each of the biological parents of the grandchild has:
(A) died;
(B) had the person's parental rights terminated; or
(C) executed an affidavit of waiver of interest in child or an affidavit of relinquishment of parental rights under Chapter 161 (Termination of the Parent-Child Relationship) ad the affidavit
designates an authorized agency, licensed child-placing agency, or person other than the child's stepparent as the managing conservator of the child; and
(2) the grandchild has been adopted or is the subject of a pending suit for adoption by a person other than the child's stepparent."
Tex. Fam. Code §153.434 (2009).

"(a) In a suit in which the best interests of a child are at issue, other than a suit filed by a governmental entity requesting termination of

the parent-child relationship or appointment of the entity as conservator of the child, the court may appoint one of the following: .....
(3) a guardian ad litem. ....
(b) In determining whether to make an appointment under this section, the court: .....
(2)may make an appointment only if the court finds that the appointment is necessary to ensure the determination of the best interests of the child,.....
Tex. Fam. Code §107.021 (2010).

STATEMENT

This case involves recurring constitutional challenges to certain provisions of the Texas Family Code which define the circumstances under which a grandparent may bring suit against a parent for possession of and access to a grandchild.

In August 2009, the real party interest, William Pemberton (hereinafter, "Pemberton") filed suit seeking possession of and access the children, the subject of the suit and requesting the appointment of a psychologist to act as a guardian ad litem for the children and an expert witness for the Court. Petitioner, Richard Scheller (hereinafter, "Scheller) filed a response denying the allegations and requesting that the suit be dismissed. App., *infra*, 41a-43a. The respondent did not dismiss the suit at the hearing on October 12, 2009, but instead entered temporary orders on November 12, 2009. App., *infra*,15a-26a. The Third Court of Appeals originally granted Petitioner's request for Stay, but ultimately upheld the

temporary orders and dismissed the Stay. *In re Scheller, 2009; Tex. App. LEXIS 10070* (Tex. App.–Austin, Dec. 23, 2009); App., *infra*, 44a-45a. The Texas Supreme Court, the highest civil court in the State of Texas, held that Pemberton failed to meet his burden of proof and instructed the trial court to lift the temporary orders pertaining to possession of and access to the children. They did not instruct the trial court to lift the remaining orders or dismiss the case. Although Scheller raised the issues of standing and subject matter jurisdiction, they were not addressed in the original opinion and the Motion for Rehearing was denied without opinion. *In re Scheller*, *supra*, 325 S.W.3d 640; *In re Scheller, 2010 Tex. LEXIS 969 (Tex., Dec. 10, 2010);* App., *infra,* 1a-13a; 14a; 62a-65a.

REASONS FOR GRANTING THE PETITION

If, as expected, Petitioner prevails again at trial, it will render Petitioner's constitutional challenges moot, thereby depriving this Court of jurisdiction. In the interim, the failure of the court to apply the *Troxel* analysis to all aspects of the case and grant Scheller's request for dismissal has and will continue throughout the process to cause him irreparable harm. *Troxel*, 530 U.S. at 68-71. Having exhausted all review in the state courts, Scheller invokes the jurisdiction of this Court to provide the extraordinary relief necessitated by the interference with his fundamental liberty interest. A determination by this Court that the constitutional protections afforded to a parent by the Fourteenth Amendment apply from the inception of a case and throughout the course of the entire litigation, will provide protection to Scheller and many other

parents and increase judicial economy throughout the states. U. S. Const. amend. XIV, § 1.

I. Given the fundamental liberty interests at stake, the *Troxel* analysis must be applied to all facets of a case which burden the decision making authority of a parent. *See Troxel v. Granville*, 530 U. S. 57; 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (*plurality op.*).

Scheller's situation is almost identical to that of Tommie Granville. *See Troxel v. Granville*, 530 U. S. 57, 61; *In re Scheller*, 325 S.W. 3d 640, 641-642 (Tex. 2010); App., *infra*,1a -13a. As in *Troxel*, this case involved a conflict over the frequency and manner of visitation. *Id.* Additionally, Pemberton requested and the trial court ordered the appointment of a psychologist to evaluate the circumstances of the parties and the children and to make recommendations that Scheller is required to follow. App., *infra,* 24a. Pemberton did not allege and no court found that Scheller was an unfit parent. App., *infra*, 1a-13a; 15a-26a; 27a-40a.

In *Troxel v. Granville*, this Court reaffirmed the "interest of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests." *Troxel,* 530 U. S. at 65; *citing*, *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) ('includes the right of parents to "establish a home and bring up children" and "to control the education of their own.'"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925) ('"liberty of parents and guardians" includes the right "to direct the upbringing

and education of children under their control."..... " and to recognize and prepare him for additional obligations."'); *Prince v. Massachusetts*, 321 U. S. 158 (1944) ("right of parents to direct the upbringing of their children). In regard to the issue of possession and access, the Texas Supreme Court followed the same analysis as the *Troxel* court. *Troxel*, 530 U.S. at 68-71; *In re Scheller*, 325 S.W. 3d at 643-644; App., *infra*, 5a-7a. Specifically, the Texas Supreme Court held that: 1) Pemberton did not meet his burden to overcome the presumption that Scheller was acting in the best interest of his children and 2) Scheller appears to be willing to allow Pemberton to see the girls. *Id.* Accordingly, the Texas Supreme Court instructed the trial court to lift the temporary orders to the extent they awarded Pemberton possession of and access to the Scheller's children. *Id.* at 646; App., *infra*, 13a. Inexplicably, the Texas Supreme Court declined to apply those same principles to the Scheller's remaining complaints.

" The burden of litigating a domestic relations proceeding can itself be "so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated." *Troxel*, 530 U. S. at 74, (noting Justice Kennedy's opinion at 101). Such burden is evident in the case at bar. For example, simply because this suit is pending, Scheller is prohibited by the *Travis County Standing Order Regarding Children, Property and Conduct of the Parties* from doing things parents are normally entitled to do, such as removing the children from the State of Texas without the written agreement of

Pemberton or a court order. App., *infra*, 33a. He is limited as to what he can say to his own children. App., *infra*, 22a.

Scheller is also required to submit his private family life to investigation by a court appointed expert and comply with her recommendations. App., *infra*, 24a. Appointing a psychologist, appointing a guardian ad litem, or taking any action other than dismissing Pemberton's cause of action, is nothing more than an effort " to further question the ability of" Scheller "to make the best decisions concerning the rearing of" his "children." *Troxel* 530 U. S. at 68-69. The Texas Supreme Court found this argument "unpersuasive". *In re Scheller*, 325 S.W.3d at 645; App., *infra*, 11a.

No discussion or guidance was provided in regard to the issues of standing or subject matter jurisdiction. *In re Scheller*, 325 S.W.3d 640, *supra*,; *In re Scheller, 2010 Tex. LEXIS 969 (Tex., Dec. 10, 2010);* App., *infra*, 1a-13a; 14a.

Due to the nature of the liberty interest at stake, each statue challenged by Scheller should be subjected to a strict scrutiny review. *Troxel*, 530 U.S. at 80. Each must be "narrowly tailored to serve a compelling government interest." *Id.* "No Texas court that has considered the Grandparent Access Statute has articulated a compelling government interest served by the statute." *In re Pensom*, 126 S.W.3d 251, 254 (Tex. App. – San Antonio 2003, orig. proceeding). Nor did the Texas Supreme Court choose to articulate one in the case at bar. *See In re Scheller*, 325 S.W. 3d

640 (Tex. 2010); App., *infra*, 1a-13a.

A. Pemberton's lack of standing deprived the trial court of subject matter jurisdiction.

"Standing is a constitutional prerequisite to maintaining a lawsuit under both federal and Texas law...". *Texas Ass'n of Bus v. Texas Air Control Bd.*, 852 S.W.2d 440,444 (Tex. 1993). It is a component of subject matter jurisdiction and is a constitutional prerequisite to maintaining a lawsuit in Texas. *Id.* As Pemberton failed to meet his burden of proof, the statutes under which Pemberton claims standing and seeks relief cannot be constitutionally applied to Scheller. *In re Scheller*, 325 S.W. at 643; Tex. Fam. Code § §153.432; 153.433; 154.434; *See also* 105.001; 107.021; 107 (a) (3) and (b) (2). Further, Section 153.433 (3) (c) of the Texas Family Code discriminates against Scheller based solely on his status as a former widower. Tex. Fam. Code §153.433 (3) (c) (2009).

"Texas courts have consistently held that a grandparent's standing to request access is conferred by Section 153.432, not 153.433". *In re Smith*, 260 S.W.3d 568, 573 (Tex. App. – Houston [14th Dist.] 2008); Tex. Fam. Code §153.432 (2009). The only limitations are that the grandparent be a biological or adoptive grandparent. Tex. Fam. Code §153.432 (a) (2009). Standing is specifically precluded, if both parents, rather than one parent, are: dead, have had their rights terminated, or have executed affidavits waiving or relinquishing their parental rights and the child is or will be adopted by someone other than a

step-parent. Tex. Fam. Code §153.434 (2009). Other statutes are available to address situations referenced by Justice O'Connor in which a grandparent has assumed the responsibility of providing actual care for the child or seeks to do so. *Troxel* 530 U.S. at 64; Tex. Fam. Code §§ 102.003; 102.004. The statutes pertinent to this cause, relate only to circumstances similar to those in the case at bar, in which a grandparent seeks to have possession of or access to a child, at his or her discretion, and for limited periods of time. Tex. Fam. Code §§153.432 and 153.434 (2009).

A facial review of Section 153.432 of the Texas Family reveals that there is no stated requirement either to consider the fitness of the parent or to overcome the presumption that the fit parent is acting in the best interest of the child. Tex. Fam. Code §153.432 (2009). There is also no requirement that the child of the grandparent filing suit fall into one of the four categories required for the grandparent to ultimately prevail on the merits. Nothing in this statute bars a grandparent from bringing suit, tendering discovery, requesting the appointment of one or more experts to investigate the home and circumstances of the parents, obtaining temporary support, obtaining injunctive relief, prohibiting the parent from moving beyond a specific geographic area, and whatever other relief a given trial court, in its wide discretion, may deem necessary "for the safety and welfare of the child." *In re Scheller*, 325 S.W.3d at 644; Tex. Fam. Code §105.001. Additionally, whatever interest the state may have in furthering the relationship between the grandparent and the child

while one parent remains alive and fit, it disappears without further question when both parents die, are proven unfit or voluntarily relinquish their rights and duties to the child. Tex. Fam. Code §153.434 (2009). Neither statute specifies a compelling or even a rational basis for permitting the grandparent's intrusion into the parent's decision making process. Tex. Fam. Code §§ 153.432 and 153.434 (2009). Therefore, the statutes can only withstand a facial challenge, if they are interpreted to imply a requirement that the grandparent either prove the parent unfit or overcome the presumption that a fit parent acts in the best interest of his child.

Such an interpretation would not be inconsistent with Texas law. The basis for the actual grant of relief to a grandparent is contained in Section 153.433 of the Texas Family Code. Tex. Fam. Code §153.433 (2009). In 2004, the Texas Attorney General opined in regard to the previous codification of Section 153.433 of the Texas Family Code that, "In order to avoid an unconstitutional application of the statute, a court must require a grandparent to 'overcome the presumption that a fit parent acts in the best interest of his or her child'". *See Op. Tex. Att'y Gen.* No. GA-0260 (2004); *citing*, *In re Pensom* 126 S.W.3d 251 (Tex. App. - San Antonio 2003, *orig. proceeding*). It is impossible to discern a compelling reason for not applying the same standard to all aspects of an event as intrusive as a lawsuit. Since Pemberton failed to meet the requisite burden of proof, the statutes were unconstitutional, as applied to Scheller. *In re Scheller*, 325 S.W.3d at 644. Consequently, Pemberton lacked standing; thereby depriving the trial court of subject

matter jurisdiction.

Without subject matter jurisdiction, the trial court was required to grant Scheller's request to dismiss the suit in its entirety. App., *infra*, 42a. "Error in assuming constitutional or statutory jurisdiction not conferred upon a court in question can be neither waived nor ignored." *Texas Ass'n of Bus v. Texas Air Control Bd.*, 852 S.W.2d. at 479.

Additionally, the statute which determines whether relief will be granted if Pemberton at some point acquires enough evidence to meet his burden of proof, discriminates against Scheller based solely on his status. Tex. Fam. Code §153.433 (3) (c) (2009). "The State cannot consistent with due process requirements, merely presume that unmarried fathers in general, and petitioner in particular, are unsuitable and neglectful parents." *Stanley v. Illinois*, 405 U.S. 645; 92 S.Ct. 1208, 31 L.Ed2d 551 (1972). Illinois' denial to Peter Stanley of hearing based solely on his status as an unwed father was held to be a denial of due process and equal protection of the laws guaranteed by the Fourteenth Amendment. *Id.* at 649. Likewise, Scheller's subjection to litigation based solely on status must draw the same conclusion.

None of the categories that subject the parent to endure the interference are based on the acts or omissions of the parent. Tex. Fam. Code §153.433 (3) (c) (2009). Each is based on the acts, omissions, or status of the other parent that is the child of the grandparent seeking relief. *Id.* The innocent parent has no means of avoiding or curing the perceived

defect.

Scheller in particular is being deprived of parental rights afforded to other parents and forced to suffer ongoing intrusion into the privacy of his family's life, simply by virtue of having been a widower at one point in his life. Tex. Fam. Code §153.433 (3) (c) (2009). If his first wife were in a coma, had abandoned the family, or simply chose to not exercise her court-ordered periods of possession, Scheller would be able to freely determine when and how Pemberton could visit with the children. *Id.*

The statute also creates a preemptive burden. The grandparent is not required to file suit within a certain period of time following the occurrence that permits relief or even prior to a change in status. Tex. Fam. Code §153.433 (2009). Once the triggering event has occurred, a parent must make every decision knowing that disapproval by an in-law or former in-law could result in a lawsuit. At the time Pemberton filed suit, Scheller had remarried and Pemberton and his wife disapproved of Scheller's new wife. *In re Scheller*, 325 S.W.3d at 642; App. *infra*, 2a.

B. The appointment of a court appointed expert to serve as the guardian ad litem and the psychological expert violated Scheller's due process right to make decisions concerning the care, custody, and control of his daughters.

The Texas Supreme Court acknowledged that, "despite the considerable discretion vested in courts to

issue temporary orders 'for the safety and welfare of the child,' a court cannot act to infringe on a party's constitutional rights." *In re Scheller*, 325 S.W.2d at 644; citing *Troxel v. Granville, supra.*; App. *infra*, 9a. Nor can a trial court "infringe on the fundamental right of parents to make child rearing decisions simply because [it] believes a better decision could be made.'" *Id.* at 642; *citing*, *Troxel v. Granville*, 530 U. S. 57; 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality op.); App. *infra*, 4a. Nevertheless, they went on to reason that "the trial court's appointment of an evaluative expert does not infringe on Scheller's rights because such an appointment is allowed by law.." *Id.*, at 644; App., *infra*, 9a. Words do not become constitutional simply by virtue of being codified. "Rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State." *Pierce v. Society of Sisters*, 268 U.S. 510, 535, 45 S.Ct. 571, 69 L. Ed. 1070 (1925).

It is true that Texas law permits the appointment of a guardian ad litem " in a suit in which the best interests of a child are at issue..." Tex. Fam. Code §105.001 (2009). Even if this Court believes that not every statute must reject the best interest standard and require a showing of harm, the Texas legislature has already determined that Texas grandparents must meet that higher burden. §153.433 (2) (2009). Further, not only is the expert authorized to invade the sanctity of Scheller's current marriage and relationship with his children, in order to obtain evidence for Pemberton's suit, she is also empowered to substitute her judgment for that of Scheller's. App.

infra, 24a. Should Scheller determine that the expert's decisions were not in the best interest of his children and refuse to cooperate, his refusal is punishable by contempt, which includes the possibility of fines and confinement in the county jail. Tex. Fam. Code §105.001 (f). Once again, as the Texas Supreme Court had already determined that Scheller was not unfit and that Pemberton failed to overcome the presumption that Scheller was acting in the best interest of the children, the only result can be that the statute is unconstitutional as applied to Scheller. *See In re Scheller*, 325 S.W.2d 640 (Tex. 2010) (per curiam).

CONCLUSION

Unless each statute utilized to bring and maintain a lawsuit by a non parent against a parent is interpreted to require the non parent to meet the burden of proof equal to that required to obtain the ultimate relief, then the protections which should be afforded to every fit parent, will belong only to those with sufficient funds and stamina to withstand the perils of litigation.

WHEREFORE, for the reasons stated, petitioner prays:

1. That a writ of mandamus issue from this Court, directed to the Honorable Leonard Saenz, Associate Judge for Travis County, Texas, requiring said Honorable Leonard Saenz, to show cause on a day to be fixed by this Court, why mandamus should not issue from this Court directing said Honorable

Leonard Saenz, to vacate and expunge from the record the orders entered on November 12, 2009 and to dismiss Pemberton's cause in its entirety.

2. In the alternative, that a writ of mandamus issue from this Court, directed to the Supreme Court of Texas, requiring said Supreme Court of Texas, to show cause on a day to be fixed by this Court, why mandamus should not issue from this Court directing said Supreme Court of Texas, to consider petitioner's constitutional challenges regarding standing and subject matter jurisdiction in accordance with the opinions rendered by this Court in the cases of *Troxel v. Granville* and *Stanley v. Illinois*. *See Troxel v. Granville*, 530 U. S. 57; 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality op.); *Stanley v. Illinois*, 405 U. S. 645, 658; 92 S.Ct. 1208, 31 L. Ed. 2d 551 (1972).

3. That this Court Stay the remaining temporary orders and injunctions imposed on Scheller during the consideration of the challenges raised herein.

4. That petitioner have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

CECILIA M. WOOD
ATTORNEY AND COUNSELOR
AT LAW, P. C.
1122 Colorado Street, Suite 100B
Austin, Texas 78701
Telephone No.: (512) 708-8783
Facsimile No.: (512) 708-8787
Cecilia@ceciliawood.com
Counsel for Petitioner

APPENDIX

APPENDIX A

IN RE RICHARD SCHELLER, REALTOR

09-1072
SUPREME COURT OF TEXAS

325 S.W.3d 640; 2010 Tex. LEXIS 853; 54 Tex. Sup. J. 198

November 5, 2010, Opinion Delivered

SUBSEQUENT HISTORY: Rehearing denied by, Stay denied by *In re Scheller, 2010 Tex. LEXIS 969 (Tex., Dec. 10, 2010)*
PRIOR HISTORY: *In re Scheller, 2009 Tex. App. LEXIS 10070 (Tex. App. Austin, Dec. 23, 2009)*
OPINION
[**1]

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54 Tex. Sup. J. 198

[*641] ON PETITION FOR WRIT OF MANDAMUS
PER CURIAM

In this grandparent-access suit, the trial court issued temporary order that included granting a grandfather temporary access to and possession of his grandchildren. However, the trial court abused its discretion in issuing the order because the grandfather did not established by a preponderance of the evidence that denial of access to or possession of the grand children would significantly impair their physical health or emotional well-being. For the reasons expressed below, we conditionally grant mandamus relief

and direct the trial court to vacate

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its temporary order for access and possession.

Amanda Scheller passed away in September 2007.

She was survived by her two young daughters and husband, Richard Scheller ("Scheller"). Both before and after Amanda passed away, her daughters visited Amanda's father and step-mother, William Pemberton ("Pemberton") and Judy Pemberton ("Judy"), every four to six weeks in Crockett, Texas. During the year after Amanda's death, Scheller relied on the Pembertons for assistance taking care of his two daughters. The girls currently live in Austin with Scheller and his new wife, Sylvia.

[*642] The Scheller's relationship[**2] with

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the Pembertons began to deteriorate in December 2008. Scheller alleges the conflict began when he took the children to visit the Pembertons in Crockett on Christmas day, rather than Christmas eve. The Pembertons blame the conflict, in part, on decreased frequency of visits, which they attribute to Scheller's relationship with Sylvia. But Scheller claims the decreased visits were a result, in part, from the Pembertons admitted refusal to follow set conditions he laid out for his children's visits, such as avoiding certain topics of conversation and adhering to a particular bed-time. Conflict over the time and manner of the Pemberton's visits with the girls continued throughout 2009. Verbal confrontations

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about the girls arose on the telephone , in public, and at the Scheller's home in Austin.

Pemberton filed suit for grandparent access in August 2009. *See TEX. FAM. Code § 153.432* (providing for suits by grandparents for possession or access to grandchildren). He petitioned for temporary access to the girls and for the court to appoint an expert to evaluate whether denying Pemberton access to the girls would significantly affect their physical health or emotional well-being. The [**3] trial court rendered temporary orders awarding Pemberton the following access rights: (1) weekly telephone or webcap access to the girls for up to ten minutes, (2) possession and access one

weekend of every even-numbered month, (3) possession and access from December 28th through December 30th, and (4) possession and access for either the second week of July or the week during which a particular Vacation Bible School is held. The orders contain general conditions and restrictions that the Pembertons must follow while the children are with them. The court also appointed an expert to serve both as the children's guardian ad litem and as psychological expert to evaluate the relationship between the children and the parties in conflict and make recommendations regarding whether denying Pemberton access to his granddaughters would significantly impair their

physical health or emotional well-being.

Scheller sought mandamus relief in the court of appeals. The court granted temporary relief and stayed the trial court's temporary order, but subsequently lifted the stay and denied mandamus relief. Scheller now seeks mandamus relief from this Court. He argues that the temporary orders for access [**4] to and possession of the children and appointment of an expert violated his fundamental liberty interest as a parent to have control and autonomy in making child-rearing decisions. Scheller requests that we reverse the trial court's order for temporary access and render judgment denying Pemberton's petition for access and

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appointment of an expert. We address each contention.

Trial courts have considerable discretion in making temporary orders for a child's safety and welfare in suits affecting the parent-child relationship. *See TEX. FAM. CODE § 105.001.* However, trial court cannot "infringe on the fundamental right of parents to make child rearing decisions simply because [it] believes a better decision could be made." *Troxel v. Granville, 530 U.S. 57, 72-73, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)* (plurality op.) (Internal quotations omitted); *see also In re Chambless 257 S.W.3d 698, 700 (Tex.2008)* (per curiam) ("parents enjoy a

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fundamental right to make decisions concerning the care, custody, and control of their children."(quotation omitted)). We have held that "so long as a parent adequately for his or her children (*i.e.*, is fit), there will

normally be no reason for the State to inject itself in to the [**5] private realm of the family." *In re Derzapf, 219 S.W.3d 327, 333* [*643] *(Tex. 2007)* (per curiam) (quoting *In re Mays-Hooper, 189 S.W.3d 777, 778(Tex.2006)* (per curiam) (quoting *Troxel, 530 U.S. at 68)*).

Scheller first argues that the trial court improperly issued the temporary orders for access to and possession of the children. A trial court abuses its discretion if it grants temporary access to

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grandchildren when a grandparent does not " overcome the presumption that a parent acts in his or her child's best interest by proving that 'denial. . . Of access to the child would significantly impair the child's physical health or emotional well-being.'" *Derzapf, 219 S.W.3d at 333* (quoting *TEX. FAM. CODE § 153.433(2)* (current version at *TEX. FAM. CODE § 153.433 (a) (2)*)).

We have granted conditional mandamus relief in similar cases when a grandparent does not overcome his "high threshold" burden. *Derzapf, 219 S.W.3d at 335; Mays-Hooper, 189 S.w.3d at 778.* In *Derzapf*, we held that the grandchildren's "lingering

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sadness" from lack of contact with the grandparents did not sufficiently demonstrate significant harm to the children because the court-appointed psychologist testified that the sadness did [**6] not "manifest [] as depression or behavioral problems or acting out" so as to "rise to a level of significant emotional impairment." *219 S.W.3d at 330, 332-33.* And in *Mays-Hooper*, we

held the trial court erred because it " did not indicate any reason why" it should interfere with the parent-child relationship, and the mother "articulated several reasons for not wanting to turn her son over to her mother-in-law[,]" including "differences about church attendance, what to say about [the father's] death, and alleged

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inattention by her mother-in-law." *189 S.W3d at 778.*

The United States Supreme Court addressed the issue of grandparent access in *Troxel v. Girardville, 530 U.S. 57, 120 S. Ct. 2054, 147 l. Ed. 2d 49 (20000* (plurality op.). The Court held that a trial court's order for grandparent access unconstitutionally infringed on the parent's fundamental liberty interest where there was no evidence that the parent was unfit, that the children's health and well-being would suffer, or that the parent intended to exclude grandparent access entirely. *Id. at 68-71.* Accordingly, the Court

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affirmed the Washington Supreme Court's holding that "'[p]arents have a right to limit visitation of their children with third persons,' and [**7] between parents and judges, 'the parents should be the ones to choose whether to expose their children to certain people or ideas.'" *Id. at 63* (quoting *In re Custody of Smith, 137 Wn.2d 1, 969 P.2d 21, 31 (Wash. 1998)*).

Similar to *Derzapf* and *Mays-Hooper*, the trial court abused its discretion in this case because Pemberton did not satisfy his burden to be granted access rights. Pemberton argues that he met the

statutory burden to prove that his granddaughters' mental and physical health would suffer if he did not

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have access to them. He presented evidence about behavior exhibited by the girls and circumstances influencing their mental and physical health including: (1) the girls displaying anger; (2) one of the girls experiencing instances of isolated bed wetting and nightmares; (3) witnesses who have seen Pemberton with the children testifying that, from their experiences, denying Pemberton access to his granddaughters would impair the children's physical or emotional development; and (4) the significant impact of loss of maternal family members on the girls, leaving Pemberton the only remaining maternal familial connection.

However, that evidence is not enough to

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satisfy Pemberton's hefty statutory [**8] burden, and we hold that the trial [*644] court abused its discretion in issuing a temporary order for access to and possession of the children. Like the children in *Derzapf,* there is nothing in the record here to indicate anything more substantial than the children's understandable sadness resulting from losing a family member and, according to the Pembertons, missing their grandparents. *219 S.W.3d. At 330.* In fact, the record shows that Scheller has taken responsible, precautionary measures to ensure that his daughters are able to cope with their grief, such as sending his older daughter to counseling and grief groups. As in

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Troxel, Scheller appears to be willing to allow Pemberton to see the girls as long as he comes to Austin and does not bring Judy. [1] Scheller concedes he has not spoken with Pemberton since this litigation began, but explains that his attorney advised him against it.

1Step-grandparents do not have standing to seek access to their step-grandchildren. *See Derzapf, 219 S.W.3d at 331-33.*

We hold that the trial abuse its discretion in granting a temporary order for access to and possession of the Scheller girls because Pemberton did not meet the hefty statutory burden [**9]

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required to prove that he is entitled to grandparent access rights. If evidence is presented as the litigation develops that overcomes the hefty presumption, the trial court may reconsider the issue. However, there was insufficient evidence at this stage of the litigation for the trial court to issue the temporary order granting Pemberton access to and possession of his granddaughters.

Next, Scheller challenges the trial court's order appointing an expert to serve both as guardian ad litem to the children and as an expert psychologist to examine the parties and children to make recommendations to the court. He argues that the trial court's appointment violates his

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constitutional right to make child rearing decisions and his effectively more invasive than the temporary

access orders because it requires Scheller to follow recommendations made by the expert.

Despite considerable discretion vested in courts to issue temporary orders "for the safety and welfare of the child," a court cannot act to infringe on a party's constitutional rights. *TEX. FAM. CODE § 105.001, see also Grigsby v. Coker, 904 S.W.2d 619, 621 (Tex. 1995)* (per curiam) (holding that a trial court abused its discretion by [**10] entering a temporary gag order in a child custody modification proceeding that violated the parties' constitutional rights to free speech and due process). Parental

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control and autonomy is a "fundamental liberty interest." *Derzapf, 219 S.W.3d at 335* (quoting *Troxel, 530 U.S. at 65*). And as we previously explained, there is no reason to inject the State into the family realm when a parent adequately cares for his children. *Id. at 333*(citations and quotations omitted). However, the trial court's appointment of an evaluative expert does not infringe on Scheller's right because such an appointment is allowed by law; the order entered by the Court does not interfere with the parental relationship, but rather seeks to determine the best interests of the children; an no conflict exists between appointing the evaluating psychologist as guardian ad litem.

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The Family Code specifically provides for this type of appointment. A suit for access to a child is a suit affecting the parent-child relationship (SAPCR) in which the principal consideration is the child's best

interest. *See TEX. FAM. CODE § 101.032(a)* (defining a *SAPCR); id.* [*645] *§153.002* (explaining that "[t]he best interest of the child [**11] shall always be the primary consideration of the court in determining the issues of . . . possession of and access to the child"). In SAPCR's a trial court may appoint a psychologist or psychiatrist to conduct a mental examination of the parties and children subject of the suit. *TEX. R. CIV. P. 204.4(a).* A trial court additionally has discretion to appoint guardian

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ad litem in a suit for access to a child if it "finds that the appointment is necessary to ensure the determination of the best interests of the child. . . . ." *TEX. FAM. CODE § 107.021(a)(3), (b)(2).* Psychologist are one class of professionals qualified under the Family Code to serve as guardians ad litem. *See Id. § 107.001(5)(b),(5)(C).* In using these finite resources at the trial court's disposal to determine the best interests of the children the trial court did not abuse its discretion.

Also, nothing on the face of the order indicates that the trial court erred in appointing the same person to serve as expert psychologist and guardian ad litem. The role of the psychologist in evaluating

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the children and parties is consistent with the role of a guardian ad litem because the psychologist gives the court recommendations [**12] about the children's best interests. *See TEX. FAM. CODE § 107.002(a), (b), (e)* (detailing a guardian ad litem's duties, which include reviewing relevant records,

interviewing the parties and the children subject to the suit to determine the child's best interest, reporting to the court, testifying during hearings, and performing any other relevant tasks the court orders).

Scheller argues that this specific order violates his constitutional rights. Generally, a trial court would commit error by requiring a party to

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adhere to expert recommendations in violation of a party's constitutional rights. However, in this case, the trial court did not abuse its discretion or commit an error of law by appointing an expert to evaluate the parties and children, represent the children's best interests, and make recommendations to the court as to whether depriving Pemberton access would significantly harm the girls' emotional well-being or physical health. Scheller argues this order violates his constitutional rights because it orders his children to participate in counseling. Trial courts may order parties to participate in counseling with a mental health professional if they have a "history conflict [**13] in resolving an issue of . . . Access to

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the child." *TEX. FAM. CODE § 153.010(a)(1)*. But it is clear from the order that the trial court did not intend to require counseling, but instead intended to have an expert psychologist assist the court in making factual determinations regarding whether depriving Pemberton of access to and possession of his grandchildren would significantly impair their physical health or emotional well-being.

Scheller's argument is unpersuasive given the

content of the temporary order appointing the expert, whose dual role as a guardian ad litem and evaluate psychologist facilitates the court's factual inquiry into the children's best interest and physical and emotional welfare. The trial court appointed the

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expert "to evaluate the circumstances surrounding the relationship between the Petitioner, Respondent, and the children, and to make recommendations to the court regarding whether denial of possession and access to the children by Petitioner would significantly impair their physical health or emotional well-being." The parties are only ordered to "follow the recommendations [of the expert] and otherwise cooperate in her evaluation of the circumstances surrounding [**14] the basis of th[e] suit, including but not limited to , making the children available for any interviews, joint sessions, individual sessions, [*646] or other contact deemed necessary by [the expert] in performance of her

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duties. . . ." Further, the court will hold a hearing if party objects to the recommendations relating to whether an evaluation should be performed in a party or child. Accordingly, the expert's role as demonstrated by the trial court's order does not interfere with Scheller's constitutional rights.

Scheller is entitled to mandamus relief because the trial court abused its discretion in issuing temporary orders for grandparent access. Pemberton did not meet the burden required to divest a parent of control and autonomy in making parenting decisions.

This is irremediable error that warrants mandamus relief. *See Derzapf, 219 S.W.3d at 334-35.* However, the trial court did not err in

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appointing en expert to serve as the guardian ad litem to the children and as a psychologist to evaluate the case and make recommendations to the court regarding the children's best interests. Accordingly, without hearing oral argument, we conditionally grant mandamus relief and direct the trial court [**15] to lift the temporary order permitting grandparent access. *See TEX. R. APP. P. 52.8(c), 59.1.* We are confident that the court will comply, and the writ will issue only if it does not.

OPINION DELIVERED: November 5, 2010

APPENDIX B

IN RE RICHARD SCHELLER

09-1072

SUPREME COURT OF TEXAS

2010 Tex. LEXIS 969

December 10, 2010, Order Pronounced

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: [*1]

From Travis County; 3rd district (03-09-00678-CV, SW3d , 2009 Tex. Appl. LEXIS 10070, 12-23-09).

In re Scheller, 325 S.W.3d 640, 2010 Tex. LEXIS 853 (Tex., 2010)

OPINION

MOTION FOR REHEARING OF CAUSE DENIED.

Motion to Reinstate Stay Denied.

APPENDIX C

NO. D-1-FM-09-004325

IN THE INTEREST OF	§	IN THE 261ST JUDICIAL
	§	
	§	
ALLISON ELIZABETH SCHELLER and EMMA MARIE SCHELLER,	§	DISTRICT COURT OF
	§	
	§	
	§	
	§	
	§	
Children	§	TRAVIS COUNTY, TEXAS

TEMPORARY ORDERS IN
GRAND PARENT ACCESS SUIT

On October 12, 2009, the Court heard Movant's Motion for Temporary Orders, which included a request for temporary access and the appointment of an expert to make recommendations to the court.

Appearances

Movant, William R. Pemberton, appeared in person and through his attorney of record, JoAl cannon Sheridan, and announced ready for hearing.

Respondent, Richard Scheller, appeared in person and trough his attorney of record, Bruce Thrasher, and announced ready for hearing.

Jurisdiction

The Court, after examining the record and the evidence and argument of counsel, finds that it has jurisdiction over the subject matter and the parties in

this case. All persons entitled to citation were properly cited.

Record

The record of testimony was duly reported by Linda Doyle, the court reporter for the Honorable Leonard Saenz.

Waiver of De Novo Appeal

The court finds that the parties agreed to waive de novo appeal of this ruling by written waiver signed in open court, as well as in open court under oath and on the record.

Children

The court finds that the following children are the subject of this suit:

Name:	Allison Elizabeth Scheller
Sex:	Female
Birth date:	May 25, 2001
County of residence:	Travis
Name:	Emma Marie Scheller
Sex:	Female
Birth date:	November 20, 2004
County of residence :	Travis

Mother

The court finds that the mother of the children the subject of this suit, Amanda Elizabeth Pemberton Scheller, died on September 20, 2007.

Findings and Orders

The court finds that Petitioner William Pemberton has standing to seek grandparent access to the children the subject of this suit pursuant to TFC § 153.433. Specifically, the court finds that at the time the suit was filed, at least one biological or adoptive parent of the child has not had that parent's parental rights terminated, and that Petitioner is the parent of

a parent of the child, and that parent of the child is deceased, as set forth in TFC §§ 153.433(a)(1) and (3)(c). The court finds that Petitioner is the father of the children's mother, Amanda Elizabeth Scheller, who passed away on or about September 20, 2007.

The court further specifically finds that for purposes of these temporary orders, Petitioner has overcome the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access by Petitioner to the children the subject of this suit would significantly impair their physical health or emotional well-being.

Accordingly, the court GRANTS Petitioner's request for temporary orders for possession of and access to the children under the terms and provisions set forth in detail below. The court further GRANTS Petitioner's request for the appointment of an expert as more fully set forth below. The court finds that these temporary orders are in the best interest of the children.

Possession Of and Access To the Children

The court finds that Petitioner should be awarded possession of and access to the children as follows:

1. Telephone Access- IT IS ORDERED that Petitioner shall have telephone access with the children every Tuesday of each week at 7:00 p.m. Said telephone conversations with the children shall not exceed 10 minutes. Respondent and/or his agents shall make the children available at 7:00 p.m. each Tuesday for the purpose of complying with this

provision for telephone access. IT IS FURTHER ORDERED that Petitioner shall initiate the phone call by calling Respondent's cell phone, which number was provided to Petitioner in open court.

2. Webcam Access- IT IS ORDERED that both Petitioner and Respondent shall purchase and take all actions necessary to set up webcam capabilities on their respective computers so that the above-ordered telephone access may be effectuated through said medium. IT IS ORDERED that said webcam capabilities shall be established by both Petitioner and Respondent in their respective households no later that October 25, 2009. IT IS FURTHER ORDERED that said webcam access to the children, once established, shall take place every Tuesday of each week at 7:00 p.m. IT IS ORDERED that Petitioner shall initiate the webcam contact with the children, and IT IS FURTHER ORDERED that Respondent shall make the children available at the designated time and place for said contact. The webcam access to the children shall not exceed 10 minutes total for both children combined.

3. Weekend Possession and Access- IT IS ORDERED that Petitioner is awarded possession of and access to the children in even-numbered months, beginning at 4:00 p.m. on the second Friday of each-numbered month, and ending at 6:00

p.m. the immediately following Sunday. IT IS FURTHER ORDERED that for the month of October 2009, Petitioner shall have possession of the children beginning at 4:00 p.m. on Friday, October 16, 2009, and ending at 6:00 p.m. on Sunday, October 18, 2009.

4. Holiday/Winter Break Possession- In addition to the above ordered possession and access, Petitioner shall have possession of the children each year during the holiday/winter break (as determined by the school calendar of the schools which the children attend), beginning at 10:00 a.m. on December 28th, and ending at 6:00 p.m. on December 30th. This holiday possession is intended to be in addition to, and not in lieu of, any other designated weekend visitation which may occur in the same month.

5. Summer Possession- IT IS ORDERED that Petitioner shall have possession of the children for a one week period each summer, which week shall be Petitioner's choice of either of the following:

   (A). The second week of July, beginning at 4:00 p.m. on the second Friday of July and ending at 6:00 p.m. on the third Friday of July; OR

   (B). The week during the summer in which the Crockett First Methodist Church Vacation Bible

School is held, beginning at 4:00 p m. on the Friday immediately preceding the first day of vacation Bible school and ending the following Friday at 6:00 p.m., provided that Petitioner inform Respondent within 5 days of learning the dates of the Vacation Bible School, and in no event shall the notice be later than May 15th of each year.

General Terms and Conditions

Except as otherwise explicitly provided, the terms and conditions of possession of the children are as follows:

1. Surrender of Children by Respondent Richard Scheller. Richard Scheller is ORDERED to surrender the children to Petitioner William Pemberton at the beginning of each period pf Petitioner William Pemberton's possession at the residence of Richard Scheller at the time specified in these Temporary Orders.
2. Return of Children by Petitioner William Pemberton. Petitioner William Pemberton is ORDERED to return the children to Richard Scheller at the end of each period of Petitioner William Pemberton's possession at the residence of Richard Scheller at the time specified in these Temporary Orders.
3. Personal Effects. Each party is ORDERED to return with the children the personal effects that the children

brought at the beginning of the period of possession.

4. Designation of Competent Adult. Petitioner William Pemberton and Respondent Richard Scheller may designate any competent adult to pick up and return the children, as applicable. The parties agree that either Petitioner or Respondent, or a person designated by them shall be present when a child is picked up or returned.

5. Inability To Exercise Possession. Petitioner shall give notice to the person in possession of the child on each occasion that he will be unable to exercise his right of possession for any specified period.

6. IT IS ORDERED that when school is in session, Petitioner shall honor the 9:00 p.m. bedtime requested by Respondent. However, IT IS FURTHER ORDERED that, at his discretion, the children's bedtime may be extended to 10:00 p.m. during the summer visitation period.

The court finds that the above ordered grandparent possession and access is in the best interest of the children.

Temporary Injunctions

The court finds that the parties are entitled to a temporary injunction and that the injunction is in the best interest of the children of the parties. IT IS, THEREFORE, ORDERED that the parties are temporarily enjoined from:

1. Speaking or writing obscene, disparaging, or demeaning remarks or statements to or about the other party or any member of the other party's family or household, in front of, in the presence of, in a manner designed to be observed or overheard by, or otherwise within the hearing of field-of-vision of the children.
2. Discussing, commenting on, or referencing in any way any of the following subjects in front of, in the presence of, or within the hearing or field-of-vision of the children: this lawsuit; any legal theories asserted in this lawsuit ; any court hearing or proceeding that has occurred in this lawsuit; any testimony or evidence that has been offered or admitted at any court hearing or proceeding in this lawsuit; any relief that is requested in this lawsuit.
3. From asking or instructing the children to tell the other party anything (except common social pleasantries or mundane or routine inquiries of social or seasonal nature), from asking or instructing the children to give or deliver any writing or document to the other party, and from otherwise communicating with the other party through the children.
4. From airing disputes or grievances during exchanges of possession of the children.
5. From disparaging or otherwise making negative comments about the religion or religious practices of the other party or their family member.
6. Petitioner William Pemberton is temporarily enjoined from discussing any planned trips or

anticipated vacations or gifts over $200.00 he wishes to take with the children unless previously discussed and approved by Respondent.

7. Petitioner is further temporarily enjoined from purchasing gifts or clothing items in excess of $200.00 per visit, without prior approval of Respondent.

8 Petitioner and his agents are enjoined from initiating any questions to the children regarding Respondent's marriage or the level of commitment that may exist between Respondent and his spouse.

IT IS ORDERED that the preceding injunctions and orders shall be and hereby are effective immediately and shall continue in full force and effect during the pendency of this suit. **IT IS FURTHER ORDERED** that the preceding injunctions and orders shall be and are binding on Petitioner William Pemberton and Respondent Richard Scheller; on their agents, servants, and employees; and on those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise. The requirement of a bond is hereby waived.

Communication Between Parties Regarding the Children

IT IS ORDERED that Petitioner and Respondent shall communicate directly with one another regarding all issues concerning the children as relate to possession, access, and all other issues addressed herein. IT IS ORDERED that neither party shall communicate with the other by or through another person, including the spouses of the parties,

except in cases of emergencies regarding the physical health of the parties or the children. Said communication between Petitioner and Respondent shall be via email, land-line telephone, or mobile phone.

Appointment of Court-Appointed Expert

The court appoints Dr. Allison Wilcox, Ph.D., as the court appointed expert in this matter, to serve as the independent Guardian Ad Litem for the children, as well as the psychological expert to evaluate the circumstances surrounding the relationship between the Petitioner, Respondent, and the children, and to make recommendations to the court regarding whether denial of possession of and access to the children by Petitioner would significantly impair their physical health or emotional well-being.

IT IS FURTHER ORDERED that the parties and their agents, servants, and representatives shall follow the recommendations of Dr. Wilcox and otherwise cooperate in her evaluation of the circumstances surrounding the basis of this suit, including but not limited to, making the children available for any interviews, joint sessions, individual sessions, or other contact deemed necessary by Dr. Wilcox in performance of her duties hereunder.

IT IS ORDERED that the parties shall work with Dr. Wilcox regarding setting appropriate guidelines and boundaries for issues that arise during periods of possessions and access.

IT IS ORDERED that Dr. Wilcox shall prepare a written repot, which includes her conclusions and recommendations, no later than February 15, 2010, unless otherwise agreed by the parties or requested by Dr. Wilcox and approved by the court.

Respondent Richard Scheller is ORDERED to execute all releases necessary for Dr. Wilcox to be able to contact and communicate with any therapist with whom either child has, or has had, a professional relationship. IT IS FURTHER ORDERED that any therapist with whom the children have, or have had, a professional relationship, other than Dr. Wilcox or a person recommended by her, shall not be allowed to testify as either a fact witness or expert witness in this proceeding.

IT IS FURTHER ORDERED that the parties shall follow the advice and recommendations as specifically relate to whether psychological evaluations should be performed on one or more of the parties of the children. However, the court shall allow a brief hearing on this specific issue should a party object to said evaluations in the event they are ordered.

All costs associated with the evaluation and services performed by Dr. Wilcox shall be paid by Petitioner.

Full Force and Effect

IT IS ORDERED that these orders shall be in full force and effect until final hearing in this cause, or further order of the court.

SIGNED on November 12, 2009.

//S//

The Honorable Leonard Saenz
JUDGE PRESIDING

APPROVED AND ENTRY REQUESTED:
AUSLEY, ALGERT, ROBERTSON & FLORES, L.L.P.
3307 Northland Drive, Suite 420
Austin, Texas 78731

Telephone: 512-454-8791
Facsimile: 512-454-9091
BY: //S//
JoAl Cannon Sheridan
State Bar No. 00783784
Attorneys for Petitioner, William R. Pemberton

Judicially rendered on 10/12/2009
and signed on 11/12/2009
by Associate Judge Leonard Ray Saenz pursuant to Section 201.007, Texas Family Code. Notice: All parties have the right to request a de novo hearing before a District Judge

APPROVED AS TO FORM ONLY
CECILIA M. WOOD
BY: //S//
Cecilia M. Wood
State Bar No. 21885100
Attorney for Respondent, RICHARD SCHELLER

I, AMALIA RODRIGUEZ-MENDOZA, District Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness may hand and seal of office on Dec. 1, 2009
AMALIA RODRIGUEZ-MENDOZA
DISTRICT CLERK
By Deputy: //S//

APPENDIX D

NO. D-1-FM-09-004325

IN THE	§	IN THE 261ST JUDICIAL
INTEREST OF	§	
	§	
ALLISON	§	DISTRICT COURT OF
ELIZABETH	§	
SCHELLER and	§	
EMMA MARIE	§	
SCHELLER ,	§	
	§	
Children	§	TRAVIS COUNTY, TEXAS

Original Petition for Grandparent Possession or Access

1. *Discovery Level*

Discovery in this case is intended to be conducted under level 2 of rule 190 of the Texas Rules of Civil Procedure.

2 *Objection to Assignment of Case to Associate Judge*

Petitioner objects to the assignment of this matter to an associate judge for a trial on the merits or presiding at a jury trial.

3. *Parties*

This suit is brought by William R. Pemberton, who is the maternal grandfather of the children the subject of this suit. Petitioner has standing to bring this suit as more fully detailed below.

The last three numbers of Petitioner's driver's

license number are 9224. The last three number's of Petitioner's Social Security number are 0194.

Respondent is Richard Scheller

4. *Jurisdiction*

No court has continuing jurisdiction of this suit or of the children the subject of this suit.

5. *Children*

The following children are the subject of this suit:

Name: Allison Elizabeth Scheller
Sex: Female
Birth date: May 25, 2001
County of residence:Travis
Name: Emma Marie Scheller
Sex: Female
Birth date: November 20, 2004
County of residence:Travis

6. *Mother*

The mother of the children the subject of this suit is Amanda Elizabeth Pemberton Scheller, who died on September 20, 2007.

7. *Father*

The father of the children the subject of this suit is Richard Scheller. Process should be served at 4424 Chickasaw Court, Austin, Texas 78749.

8. *Court-Ordered Relationships*

There are no court-ordered conservatorship, court-ordered guardianships, or other court-ordered relationships affecting the children the subject of this suit.

9. *Property*

No property of consequence is owned or possessed by the children the subject of this suit.

10. *Possession Of Access To Grandchildren*

It is in the best interest of the children the subject of this suit that Petitioner be granted possession of or access to the children by order of this court.

At the time this relief is requested, at least one biological or adoptive parent of the children has not had that parent's rights terminated.

Denial of possession or access by Petitioner would significantly impair the physical or emotional well-being of the children. Petitioner would show that until very recently, he has had regular and frequent possession of and access to the children and a longtime, loving relationship with them. The grandparent relationship he has with the children is strong. Denial of possession of or access to the children would destroy and bond and result in impairing the physical health and/or emotional well-being of the children. Petitioner is the only one surviving closely-related relative of the children through their deceased mother.

Petitioner is the father of Amanda Elizabeth Pemberton Scheller, the deceased mother of the children.

Amanda Elizabeth Pemberton Scheller Passed away on September 20, 2007.

Petitioner requests the Court to enter an order granting Petitioner possession of or access to the children at the times and under the conditions that are determined to be in the best interest of the children.

11. *Request for Temporary Orders*

Petitioner requests the Court, after notice and hearing, to make temporary orders for the safety and welfare of the children, including but not limited to the following:

Ordering temporary possession of or access to the children by Petitioner.

Ordering the parties to participate in an alternative dispute resolution process before trial of this matter.

Petitioner requests the Court to appoint an independent psychological expert to evaluate the circumstances surrounding the relationship between the Petitioner and the children and to make recommendations to the court regarding whether denial of possession of and/or access to the children would significantly impair the physical health or emotional well-being.

Additionally and/or in the alternative, Petitioner requests the court to appoint a Guardian Ad litem for the children to represent the best interests of the children.

12. *Request for Temporary Restraining Order*

Making disparaging remarks regarding Petitioner or the family of Petitioner in the presence or within the hearing of the children.

13. *Request for Temporary Orders and Injunction*

Making disparaging remarks regarding Petitioner or the family of Petitioner in the presence or within the hearing of the children.

14. *Request for Permanent Injunction*

Petitioner requests the Court, after trial on the merits, to grant the following permanent injunction:

Making disparaging remarks regarding Petitioner or the family of Petitioner in the presence or within the hearing of the children.

15. *Attorney's Fees, Expenses, Costs, and Interest*

It was necessary for Petitioner to secure the services of JoAl Cannon Sheridan, a licensed attorney,

to preserve and protect the children's rights. Respondent should be ordered to pay reasonable attorney's fees, expenses, and costs through trail and appeal, and judgment should be rendered in favor of this attorney and against Respondent and be ordered paid directly to the attorney for Petitioner, who may enforce the judgment in the attorney's own name. Petitioner requests postjudgment interest as allowed by law.

16. *Travis County Standing Order*

A true and correct copy of the "Travis County Standing Order Regarding Children, Property and Conduct of the Parties" is attached to this pleading as Exhibit "A" and made a part of it for all purposes, as required by the Travis County District Clerk's File No. 121,012 (Local Rules and General Orders). Petitioner has not requested specifically that this order be imposed, but attaches it in compliance with the Travis County Local Rules and General Orders

17. *Prayer*

Petitioner prays that citation and notice issues required by law. Petitioner prays that the Court grant relief in accordance with the allegations of this petition, including but not limited to awarding Petitioner reasonable possession of and access to his grandchildren, the subject of this suit, and find that same is in the best interest of the children.

Petitioner prays that the Court immediately grant a temporary restraining order restraining respondent, in conformity with the allegations of this petition, from the acts set forth above, and Petitioner prays that, after notice and hearing, this temporary restraining order be made a temporary injunction.

Petitioner prays that, on final hearing, the

Court enter a permanent enjoining Respondent, in conformity with the allegations of this petition, from the acts set forth above.

Petitioner prays for attorney's fees, expenses, costs, and interest as required above.

Petitioner prays for general relief.

Respectfully submitted,

AUSLEY, ALGERT, ROBERTSON & FLORES, L.L.P.
3307 Northland Drive, Suite 420
Austin, Texas 78731
Tel: (512) 454-8791
Fax: (512) 454-9091

By: //S//
JoAl Cannon Sheridan
State Bar No. 00783784
Attorney for William R. Pemberton

NOTICE OF HEARING

Please take notice that a hearing for the purposes of determining a visitation schedule for petitioner and the appointment of an independent psychological expert to make recommendations regarding visitation with petitioner, or in the alternative, the appointment of a guardian ad litem to represent the best interest of the children is set on the Travis County District Court's Family Law Docket at 8:30 a.m. on Wednesday, September 16, 2009, at the Travis County Courthouse, 1000 Guadalupe Street, Austin, Texas 78701

TRAVIS COUNTY DISTRICT CLERKS
FILE NO. 121,012
(LOCAL RULES AND GENERAL ORDERS)

TRAVIS COUNTY STANDING ORDER REGARDING CHILDREN, PROPERTY, AND CONDUCT OF THE PARTIES

No party to this lawsuit has requested this order. Rather, this order is a standing order of the Travis County District Courts that applies in every divorce suit and every suit affecting the parent-child relationship filed in Travis County. The District Courts of Travis County have adopted this order because the parties and their children should be protected and their property preserved while the lawsuit is pending before the court. Therefore, it is ORDERED:

1. **NO DISRUPTION OF CHILDREN**. Both parties are ORDERED to refrain from doing the following acts concerning any children who are subject of this case:
   - 1.1 Removing the children from the State of Texas, acting directly or in concert with others, without the written agreement of both parties or an order of this Court.
   - 1.2 Disrupting or withdrawing the children from the school or day-care facility where the children are presently enrolled, without the written agreement of both parents or an order of this Court.
   - 1.3 Hiding or secreting the children from the other parent or changing the children's current place of abode, without the written agreement of both parents or an order of this Court.
   - 1.4 Disturbing the peace of the children.
2. **CONDUCT OF THE PARTIES DURING THE CASE.** Both parties are ORDERED to

refrain from doing the following acts:

2.1 Using vulgar, profane, obscene, or indecent language, or a coarse or offensive manner, to communicate with the other party, whether in person, by telephone, or in writing.

2.2 Threatening the other party in person, by telephone, or in writing to take unlawful action against any person.

2.3 Placing one or more telephone calls, at an unreasonable hour, in an offensive or repetitious manner, without a legitimate purpose of communication, or anonymously.

2.4 Opening or diverting mail addressed to the other party.

3. **PRESERVATION OF PROPERTY AND USE OF FUNDS DURING DIVORCE CASE.** If this is a divorce case, both parties to the marriage are ORDERED to refrain from doing the following acts:

3.1 Destroying, removing, concealing, encumbering, transferring, or otherwise harming or reducing the value of the property of one or both of the parties.

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EXHIBIT
"A"

3.2 Misrepresenting or refusing to disclose to the other party or to the court, on proper request, the existence, amount, or location of any property of one or both

parties.

3.3 Damaging or destroying the tangible property of one or both of the parties, including any document that represents or embodies anything of value.

3.4 Tampering with the tangible property of one or both of the parties, including any document that represents or embodies anything of value. And causing pecuniary loss to the other party.

3.5 Selling, transferring, assigning, mortgaging, encumbering, or in any other manner alienating any of the property of either party, whether personal property or real estate property, and whether separate or community, except as specifically authorized by this order.

3.6 Incurring any indebtedness, other than legal expenses in connection with this suit, except as specifically authorized by this order.

3.7 Making withdrawals from any checking or savings account in any financial institution for any purpose, except as specifically authorized by this order.

3.8 Spending any sum of cash in either party's possession or subject to either party's control for any purpose, except as specifically authorized by this order.

3.9 Withdrawing or borrowing in any manner for any purpose from any retirement, profit-sharing, pension, death, or other employee benefit plan or

employee savings plan or from any individual retirement account or Keogh account, except as specifically authorized by this order.

3.10 Signing or endorsing the other party's name on any negotiable instrument, check, or draft, such as tax refunds, insurance payments, and dividends, or attempting to negotiate any negotiable instrument payable to the other party without the personal signature of the other party.

3.11 Taking any action to terminate or limit credit or charge cards in the name of the other party.

3.12 Entering, operating, or exercising control over the motor vehicle in the possession of the other party.

3.13 Discontinuing or reducing the withholding for federal income taxes on wages or salary while this suit is pending.

3.14 Terminating or in any manner affecting the service of water, electricity, gas, telephone, cable television, or other contractual service, such as security, pest control, landscaping, or yard maintenance att he other party's residence or in any manner attempting to withdraw any deposits for service in connection with such service.

4. **PERSONAL AND BUSINESS RECORDS IN DIVORCE CASE.** If this is a divorce case, both parties to the marriage are ORDERED to

refrain from doing the following acts:

4.1 Concealing or destroying any family records, property records, financial records, business records, or any records of income, debts , or other obligations.

4.2 Falsifying any writing or record relating to the property of either party.

4.3 "Records" include e-mail or other digital or electronic data, whether stored on a computer hard drive, diskette or other electronic storage device.

5. **INSURANCE IN DIVORCE CASE**. If this is a divorce case, both parties to the marriage are ORDERED to refrain from doing the following acts:

_____5.1 Withdrawing or borrowing in any manner all or any part of the cash surrender value of life insurance policies of the life of either party, except as specifically authorized by this order.

5.2 Changing or in any manner altering the beneficiary designation on any life insurance on the life of either party or the parties' children.

5.3 Canceling, altering, or in any manner affecting any casualty, automobile, or health insurance policies insuring the parties' property of persons including the parties' minor children.

6. **SPECIFIC AUTHORIZATIONS IN DIVORCE** CASE. If this is a divorce case, both parties to the marriage are specifically authorized to do the following.

6.1 To engage in acts reasonable and

necessary to the conduct of that party's usual business and occupation.

6.2 To make expenditures and incur indebtedness for reasonable attorney's fees and expenses in connection with this suit.

6.3 To make expenditures and incur indebtedness for reasonable and necessary living expenses for food, clothing, shelter, transportation, and medical care.

6.4 To make withdrawals from accounts in financial institutions only for the purposes authorized by this order.

7. **SERVICE AND APPLICATION OF THIS ORDER**

7.1 The Petitioner shall attach a copy of this order to the original petition and to each copy of the petition. At the time the petition is filed, if the petitioner has failed to attach a copy of this order to the petition and any copy of the petition, the clerk shall ensure that a copy of this order is attached to the petition and every copy of the petition presented.

7.2 This order is effective upon the filing of the original petition and shall remain in full force and effect as a temporary restraining order for fourteen days after the date of the filing of the original petition. If no party contests this order by presenting evidence at a hearing on or before fourteen days after the date of the filing of the original petition, this order

shall continue in full force and effect as a temporary injunction until further order of the court. This entire order will terminate and will no longer be effective once the court signs a final order.

8. **EFFECT OF OTHER COURT ORDERS. If any part of this order is different from any part of a protective order that has already been entered or is later entered, the protective order provisions prevail.** Any part of this order not changed by some later order remains in full force and effect until the court signs a final decree.

9. **PARTIES ENCOURAGED TO MEDIATE.** The parties are encouraged to settle their disputes amicably without court intervention. The parties are encouraged to use alternative dispute resolution methods, such as mediation, to resolve the conflicts that may arise this lawsuit.

THIS TRAVIS COUNTY STANDING ORDER REGARDING CHILDREN, PROPERTY AND CONDUCT OF THE PARTIES SHALL BECOME EFFECTIVE ON JANUARY 1, 2005

//S//	//S//
JUDGE SCOTT R. JENKINS	JUDGE W. JEANNE MEURER
53RD District Court	98th District Court
//S//	//S//
JUDGE DARLENE BYRNE	JUDGE WILFORD FLOWERS
126th District court	147th District Court

//S//

JUDGE MIKE LYNCH

167th District Court

//S//

JUDGE SUZANNE COVINGTON

201ST District Court

//S//

JUDGE LORA J. LIVINGTON

261st District Court

//S//

JUDGE BOB PERKINS

331st District Court

//S//

JUDGE MARGARET A. COOPER

353rd District Court

//S//

JUDGE BRENDA KENNEDY

403rd District court

//S//

JUDGE PAUL DAVIS

200th District Court

//S//

JUDGE JOHN K. DIETZ

250th District Court

//S//

JUDGE JON WISSER

299th District Court

//S//

JUDGE PATRICK KEEL

345th District Court

//S//

JUDGE JULIE KOCUREK

390th District Court

APPENDIX E

NO. D-1-FM-09-004325

IN THE INTEREST OF ALLISON ELIZABETH SCHELLER and EMMA MARIE SCHELLER ,	§	IN THE 261ST JUDICIAL
	§	DISTRICT COURT OF
Children	§	TRAVIS COUNTY, TEXAS

RESPONDENT'S FIRST AMENDED ANSWER

NOW COMES Richard Scheller, Respondent in this cause, and files and enters Respondent's First Amended Answer, and in support would show the following.

I.

Respondent enters a general denial.

II.

Respondent specifically denies that denial of Petitioner's possession of or access to the children would significantly impair either child's physical health or emotional well-being.

III.

Respondent specifically denies that Petitioner has been denied possession of or access to the children. Responded has offered Petitioner to have possession of and access to the children under certain limitations that are reasonable and appropriate and in the best

interest of the children.

IV.

Petitioner's request for a restraining order and temporary and permanent injunctions are groundless and frivolous. Respondent requests that Petitioner pay Respondent's reasonable legal fees and expenses incurred to defend the frivolous pleading.

V.

It was necessary for Respondent to secure the services of Bruce Thrasher, a licensed attorney, to prepare and defend this suit.

Petitioner, William Pemberton, should be ordered to pay reasonable attorney's fees, expenses, and costs through trial and appeal, and a judgment should be rendered against Petitioner in favor of Respondent. Petitioner should also be ordered to pay Respondent's for Respondent's time and energy expended in defending this cause, and for harassment and emotional distress. Respondent request postjudgment interest as allowed by law.

VI.

Respondent prays that all relief prayed for by Petitioner be denied, that this cause be dismissed, and that Respondent be granted all relief requested in this answer.

Respondent prays for attorney's fees, expenses, and costs as requested above.

Respondent prays for general relief.

Respectfully submitted,

//S//

Bruce Thrasher, SBN 1998400
Law Offices of Bruce Thrasher
3 Lakeway Centre Ct., Suite 220

Ph. 512-263-5141
Fax 512-263-5142

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing Respondent's Original Answer has been served upon all counsel or parties of record accordance with the Texas Rules of Civil Procedure on this 8th day of October, 2009.

//S//
Bruce Thrasher

APPENDIX F
TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-09-00678-CV

In re Richard Scheller

ORIGINAL PROCEEDING FROM TRAVIS COUNTY

MEMORANDUM OPINION

On December 2, 2009, relator Richard Scheller filed his petition for writ of mandamus and motion for temporary relief. *See* Tex. R. App. P. 52.8, 52.10. On December 10, we issued an order staying the trial court's order pending our resolution of Scheller's petition, allowing the real party in interest until December 22 to file a response. Having reviewed the petition, response, and record, we dissolve our stay and deny the petition for writ of mandamus.

David Puryear, Justice

Before Chief Justice Jones, Justices Puryear and

Waldrop
Filed : December 23, 2009

APPENDIX G

NO.09-1072

IN THE SUPREME COURT

IN RE RICHARD SCHELLER,

RELATOR

From the Third Court of Appeals
at Austin, Texas

RELATOR'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

CECILIA M. WOOD
ATTORNEY AND COUNSELOR
AT LAW, P. C.
1122 Colorado Street, Suite 2301
Austin, Texas 78701
Telephone No.: 512-708-8783
Facsimile No.: 512-708-8787
State Bar No. 21885100
Attorney for Relator

March 1, 2010

ORAL ARGUMENT REQUESTED

NO. 09-1072

IN THE SUPREME COURT
IN RE RICHARD SCHELLER,

RELATOR
From the Third Court of Appeals

at Austin, Texas

RELATOR'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE SUPREME COURT OF TEXAS:

Pursuant to the Texas Rule of Appellate Procedure 52 and as requested, Richard Scheller, Relator, files this Brief in Support of Petition for Writ of Mandamus seeking extraordinary relief, and in support of this request would show the Court as follows:

I

IDENTITY OF PARTIES AND COUNSEL

Relator, Richard Scheller

Appellate Counsel for Relator:	Trial Counsel for Relator
Cecilia M. Wood, Attorney and Counselor at Law, P. C. 1122 Colorado Street, Suite 2301,	Bruce Thrasher Law Offices of Bruce Thrasher 3 Lakeway Centre Ct. Ste 220

Austin, Texas 78701

Telephone No.:
512-708-8783
Facsimile No.:
512-708-8787
State Bar No.
21885100

Lakeway, Texas 78734

Telephone No.:
512-263-5141
Facsimile No.:
512-263-5142
State Bar No.
19998400

Respondent, The Honorable Leonard Saenz

The Honorable Leonard Saenz
Associate Judge for the
261st Judicial District Court
Travis County Courthouse
1000 Guadalupe
Third Floor, Judge's Office
Austin, Texas 78701

Real Party in Interest, William Pemberton
Attorney for Real Party in Interest:

JoAl Cannon Sheridan
Ausley, Algert, Robertson & Flores, L. L. P.
3307 Northland Drive, Suite 420
Austin, Texas 78731
Telephone No.: 454-8791
Facsimile No.: 454-9091
State Bar No. 00783784

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(Omitted in Printing)

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(Omitted in Printing)

STATEMENT OF THE CASE

The maternal grandfather of the children, William Pemberton (hereinafter "Pemberton"), the real party in interest and the petitioner in the trial court, filed suit against the father of the children, Richard Scheller (hereinafter "Scheller"), Relator. The suit was filed on August 13, 2009. *Appendix C.* Pemberton sought possession of and access to the children, for himself, in excess of what the father was willing to allow to include possession and access for his wife, Judy Pemberton, the step grandmother mother of the children, who lacked standing to bring suit on her own behalf. He also requested the appointment of a psychologist to serve as the guardian ad litem for the children. On August 27, 2009, Scheller filed his Original Answer, which claimed as defense, that Pemberton could not meet the burden of proof and requested dismissal of the suit. *Appendix D.*

On October 12, 2009, the Honorable Leonard Saenz rendered temporary orders which granted the relief sought by Pemberton. At the Motion to Enter, Scheller objected to the entry of the order on constitutional grounds. (R.R. November 12, 2009, page 5, line 19 - page 8, line 5). The Court overruled the objections and entered the temporary order on

November 12, 2009. *Appendix B.*

Scheller filed a Petition for Mandamus and a Motion to Stay Relief in the Third Court of Appeals sitting in Austin, Texas, in case number 03-09-00678-CV on December 2, 2009. On December 10, 2009, the Third Court of Appeals granted the Stay. On December 23, 2009, the Third Court of Appeals denied mandamus relief, without elaboration, in a memorandum opinion. *Appendix A.* Justice Puryear wrote the opinion for the panel which also included Chief Justice Jones and Justice Waldrop.

Relator is requesting this Court to issue a mandate requiring the Honorable Leonard Saenz reverse his ruling and dismiss the case.

STATEMENT OF JURISDICTION

This Court has jurisdiction under the Texas Constitution, article V, §3 and Texas Government Code, § 22.002.

ISSUES PRESENTED

Issue 1: The trial court abused its discretion in granting the temporary access to and possession of the children by Pemberton in direct contradiction to the holding in *In re Derzaph*, 219 S.W.3d 327 (Tex. 2007).

Issue 2: The trial court lacked jurisdiction to appoint an expert witness to evaluate the parties and requiring Scheller to follow her recommendations and serve as a guardian ad litem.

Issue 3: Mandamus is the appropriate remedy in this case.

STATEMENT OF THE FACTS

The real party in interest and the petitioner in cause number D-1-FM-09-004325, pending in the 261st Judicial District Court, Travis County, Texas is the maternal grandfather of the children, the subject of

the suit.

The conflict between the parties arose when Scheller decided that future visits with the children include, Pemberton only and not the step-grandmother; and that they should take place only in Austin. Rather than honor Scheller's requests, Pemberton appeared unexpectedly at Scheller's house with his wife and step-daughter and demanded to see the children. Scheller refused access under those circumstances. Pemberton responded with this lawsuit.

A. The Schellers and Pembertons experienced deep personal loss.

Amanda Elizabeth Scheller, mother of the children and Pemberton's daughter, died on September 20, 2007. (R.R. page 15, lines 21-23). During the following year, Scheller relied on the Pembertons for some support and assistance with the children. (R.R. page 8, line 21 - page 27, line 5; page 76, line 21 - page 77, line 12). In October of 2008, Scheller began a relationship with his current wife. (R.R. page 178, lines 10-12). In December of 2008, conflict began between Scheller and primarily Judy Pemberton, the step-grandmother, when Scheller decided to bring the children to Crockett on Christmas night rather than Christmas Eve. (R.R. page 81, line 14- page 82, line8; page 120, lines 12-15, lines 21-22; page 159, lines 4-12). Also, in December of 2008, Ann Pemberton, the children's biological maternal grandmother, with whom the children were very close, died. (R.R. page 160, lines 7-13).

B. The Pembertons disregard the father's express rules.

As the relationship between Scheller and the

Pembertons continued to deteriorate, Scheller set three conditions regarding the visits between the Pembertons and the children: (1) that the Pembertons not ask the children anything about Mr. and Mrs. Scheller and their relationship; (2) that the Pembertons not mention Ann Pemberton, the children's grandmother; and (3) that the children be put to bed by 9:00 p.m. each night.
(R.R. page 117, line 7 - 14; page 160, line 2 - page 162, line 1). Judy Pemberton testified that after learning of these conditions: (1) she had not put the children to bed by 9:00 p.m. and (2) to a discussion with one of the children regarding their grandmother, Ann Pemberton, in which she told the child that "grandmommy was not very nice to granddaddy and vice versa." (R.R. page 117, line 16 -18 and page 118, lines 7 - 16).

C. The Pembertons decide to directly challenge the father.

Sometime in June, 2009, the Pembertons left a voice mail message in which, thinking they had finished the call, they were recorded discussing their intentions to come to Austin and demand the children. (R.R. page 163, line 21 - page 164, line 14). Subsequently there was a confrontation with Judy Pemberton, when she returned the children on July 17, 2009, after a week long visit with the girls in Crockett.. (R.R. page 97 line 15 - page 99, line 14; page 163, lines 3-10; page 206, lines 5- 16). Pemberton then received a message from Scheller through his wife Silvia, that he was welcome to visit the children in their home, without Judy Pemberton. (R.R. page 54, lines 2-5; page 212, lines 13-14). William Pemberton did not return the call, but Judy

Pemberton informed the Schellers that he was too busy to visit in their home. (R.R. page 212, line 25 - page 213, line 1).

D. The Pembertons refuse to defer the father's decisions.

The Pembertons testified that the pattern of visitation had always been every four to six weeks, with the longest period being two months. (R.R. page 19, line 22 - page 20, line 5; page 28, lines 10 -12; page 62, lines 23-25). Nevertheless, on July 26, 2009, only nine days after the end of their last visit, the Pemberton arrived at the Scheller home, unannounced, with his wife and step-daughter; and demanded to see the children. (R.R. page 36, line 21 - page 37, line 5). When Scheller refused to allow them in the house, Judy Pemberton pushed by him and entered the home. (R.R. page 164, line 16 - page 166, line 18). Both of the Pembertons testified that Judy Pemberton raised her voice and said a cuss word where the children may have overheard. (R.R. page 52, line 20 - page 53, line 4; page 103, lines 3 -21; page 115, line 18 - page 116, line 5; page 164, line 16 - page 166, line 18). Judy Pemberton admitted that the children might have been able to hear her. (R.R. page 103, lines 3-18). The Schellers and the Pembertons then agreed to continue the discussion at Schlotzky's. (R.R. page 166, lines 19-20). The conflict continued and culminated with Mrs. Pemberton following Scheller into the parking lot screaming. (R.R. page 167, line 3 - page 168, line 21).

Even after all of the conflict, Scheller was and is still willing to allow William Pemberton to have possession of and access to the children provided he does so in the Schellers' home without the presence of

Judy Pemberton. (R.R. page 169, lines 7-19).

Only eighteen (18) days elapsed between the incident on July 26, 2009 and the filing of this suit. *See* Appendix B.

ARGUMENT

As in all Texas cases involving issues of possession of and access to a child, the primary consideration must be the best interest of the child. Tex. Fam. Code §153.002.

This, however, is not a situation where the trial court was asked to settle disputes between two equally situated fit parents. In this case, the determination is not *what* is in the best interest of the child, but *who* is legally entitled to make that determination, the father or the trial court.

The constitutional question at the heart of this dispute is whether the state, acting through her judicial system, has the right to interfere with the decisions of a fit parent in order to grant the desires of a non-parent. The answer is, it does not. "The legal system should generally defer" to the parent, "obliging the state to bear a serious burden." *Wiley v. Spratlin*, 543 S.W.2d 349 (Tex. 1976). The Supreme Court of the United States detailed that burden. *See Troxel v. Granville*, 530 U. S. 57; 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). The same principles of law must control in every case in which a non-parent chooses to use any statute to interfere with the fundament right of the parent to make decisions regarding the care, custody, and control of his child.

Scheller's rights are paramount to those of Pemberton. Legally, Scheller possesses historically recognized fundamental rights protected by the United States Constitution:

"– the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel* , 530 U. S. at 65. In contrast, the only rights afforded to Pemberton are creations of state legislation. Tex. Fam. Code §153.433. As such, they are subordinate to and must yield to the preeminent rights of Scheller. *See In re Derzaph*, 219 S.W.3d 327 (2007). Although a state possesses the authority to grant rights beyond those protected by the federal constitution to its citizens, the Due Process Clause requires that it do so in a manner that does not infringe upon the rights of parents to make child rearing decisions. *Troxel*, 530 U. S. at 72, 73. This type of analysis may seem foreign to the judiciary in Texas, which is charged with focusing first and foremost on the best interest of the child. Tex. Fam. Code §153.002. However, in this type of case, the law has already addressed that primary consideration. It is presumed that because Scheller is a fit parent, his decisions are already in the best interest of his children. *See Troxel*, 57 U.S. at 68; *In re Derzaph*, 219 S.W.3d at 333. Therefore, the trial judge satisfies the charge by following the decisions of the parent, unless and until he is presented with a preponderance of evidence that proves either Scheller is not a fit parent or that his decision will

"significantly impair the child's physical health or emotional well-being". Tex. Fam. Code §153.433 (2).

Scheller's situation is almost identical to that of Tommie Granville, Karen Mays-Hooper, and Ricky Derzaph, with the most significant difference being that Pemberton actually spent less time with and personally provided much less care for the children

than did the Granvilles or Connie Johnson for their grandchildren. *See*, *Troxel v. Granville*, 530 U. S. 57; 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).; *In re Derzaph*, 219 S.W.3d 327 (Tex. 2007); *In re Karen Mays-Hooper*, 189 S.W.3d 777 (Tex. 2006) (per curiam). As in the *Troxel*, this case involved a conflict was over the frequency and manner of visitation, rather than a total denial of access, as was the case in *Derzaph*. *See Troxel*, 530 U. S. at 61; *In re Derzaph*, 219 S.W.3d at 330. Although the Troxel court did not provide a list of specific facts and circumstances that would cause a statute as applied to be unconstitutional, it would seem that the nearly identical facts and circumstances of this case would logically support the same result.

Before a trial court can determine how it should act (decide) in a given dispute, it must decide whether it has the authority to act (decide) in that dispute. If the trial court has the right to be in the middle of a family dispute, then the trial court has wide discretion. However, if the entry way into that dispute is a statute that is unconstitutional, either facially or as applied to the facts of the case, then the constitution bars the trial court from even entering the dispute. The trial court has no jurisdiction in the instance.

The statutes challenged in this case were Sections 153.433 of the Texas Family Code, which was used as the basis for awarding Pemberton access to and possession of the children, and Sections 153.010 and 105.001 of the Texas Family Code, which were used as the basis for appointing a psychologist to serve in the dual role of psychologist and guardian ad litem. "...a statute should be interpreted in a manner that avoids constitutional infirmities." *Barshop v. Medina County Underground Water Conservation Dist.*, 925

S.W.2 618, 629 (Tex. 1996). Therefore, each of these statutes must be interpreted, in light of the constitutional mandates of *Troxel*. *In re Pensom*, 126 S.W.3d 251 (Tex. App. – San Antonio 2003, orig. proceeding); *See Troxel v. Granville*, 530 U. S. 57; 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Specifically, the Attorney General of the State of Texas issued an opinion in regard to Section 153.433 of the Texas Family Code stating the same. *See Op. Tex. Att'y Gen. No.* GA-0260 (2004).

Additionally, because Scheller challenges the constitutionality of the statutes, the standard of review is not the typical abuse of discretion review, but rather a de novo review in order to determine whether the statutes as applied to the facts of this case are constitutional. *In the Interest of C.P.J. and S.B.J*, 129 S.W.3d 573 (Tex. App. – Dallas 2003). Further, because the statutes as applied to Scheller in this case, interfere with a fundamental liberty interest, they should be subjected to a strict scrutiny review. *In re Pensom*, 126 S.W.3d at 254; *see also*, *Troxel*, 530 U.S. at 80). Each must be "narrowly tailored to serve a compelling government interest." *Id.*

In regard to the portion of the temporary order dealing with possession of and access to the children. Pemberton did not prove, or even allege that Scheller was an unfit parent. He failed to prove that Scheller was unwilling to give him some access. In rendering the temporary order, the trial court gave no deference to the wishes of Scheller.

Having failed to meet any of the three elements of Troxel, Pemberton lacked standing and, therefore, the trial court lacked to act. The statute was unconstitutional as applied to Scheller in this case.

Nevertheless, even if the trial court had been presented with sufficient evidence regarding the last two elements, there was insufficient evidence to prove that Pemberton's inability to have possession of the children in the manner that he requested, would significantly impair the physical health or emotional well-being of the children. Accordingly, the trial court abused its discretion in entering the temporary possession and access order.

One of the strongest indicators that there was insufficient evidence to enter the temporary order, was the trial court's order appointing a psychologist to serve in the dual role of :

> "independent Guardian Ad Litem for the children, as well as the psychological expert to evaluate the circumstances surrounding the relationship between the Petitioner, Respondent, and the children, and to make recommendations to the court regarding whether denial of possession and access to the children by Petitioner would significantly impair their physical health or emotional well-being." *Appendix B*, page 6.

In itself, the appointment was again an interference with Scheller's fundamental rights to make decisions regarding his children. As such, Pemberton should have been required to prove that Scheller was unfit parent and that the children would suffer significant impairment to their physical health or emotional well-being. He did not and so the trial court lacked jurisdiction to enter the orders. Scheller's request to dismiss the suit should have been granted. *Appendix D.*

However, even if the trial court had possessed

jurisdiction to enter the orders, he should have given deference to Scheller's preferences in those orders. Pemberton testified that Scheller was willing to give him some visitation, but he feared that the visitation would not occur without a court order. (R.R. page 53, line 23- page 54, line 5; page 47, lines 14-17). At trial, however, he did not request the court order the type of access and possession that Scheller had already determined was in the best interest of his children. More importantly, the trial court did not order that type of visitation. Nor did the Pemberton or the trial court give any deference to Scheller's decisions in regard to the appointment of the psychologist.

The temporary orders entered in this case interfere with Schelller's fundamental right to rear his children. It is irrelevant whether it would be better for the children to visit with Pemberton in Crockett on the schedule he desires. It is irrelevant whether it would be better for the children to be evaluated by the expert witness in order for the expert witness to make recommendations. The Due Process Clause will not permit a State, whether acting directly or by empowering a third party, to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made. *Troxel v. Granville*, 530 U. S. 57, 73; 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *In re Derzaph*, 219 S.W.3d 327, 334 (Tex. 2007).

Issue 1: The trial court abused its discretion in granting the temporary access to and possession of the children, by Pemberton, in direct contradiction to the holding in In re Derzaph, 291 S.W.3d 327 (Tex. 2007).

The trial court "must accord sufficient weight to

a fit parent's decisions about the third parties with whom his or her child should associate." *In re Smith*, 262 S.W.3d 463, 468 (Tex. App. – Beaumont 2008) ; *see also In re Pensom*, 126 S.W.3d 251, 256 (Tex. App. – San Antonio 2003, orig. proceeding). "So long as a parent adequately cares for his or her children (i.e., is fit) there will normally be no reason for the State to inject itself into the private realm of the family." *In re Derzaph*, 219 S.W.3d at 333; *citing*, *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006) (per curiam); (quoting *Troxel*, 530 U. S. At 68, 120 S. Ct. 2054).

This Court previously followed the *Troxel* case, holding that a statute granting a non-parent access is unconstitutional as applied if : (1) the parent in not unfit; (2) the decisions of the parent are not given deference, and (3) the parent is willing to allow some visitation. *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006) (per curiam). Although the statute considered in *In re Mays-Hooper* has been amended, as noted in that opinion, the constitutional principles remain the same. *See In re Mays-Hooper*, 189 S.W.3d 777 (Tex. 2006) (per curiam). "The Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests, including parents' fundamental right to make decisions concerning the care, custody and control of their children." *Troxel*, 530 U. S. at 57; *see also Washington v. Glucksberg*, 521 U. S. 702, 720 (1997); *Stanley v. Illinois*, 405 U. S. 645, 651 (1972).

The amended statute in effect when this case was filed was the same statute considered in the *Derzaph* case. *See In re Derzaph*, 219 S.W.3d 327 (Tex.

2007). The language of the statute is as follows:

> "The court shall order reasonable possession of or access to a grandchild by a grandparent if:
> (1) at the time the relief is requested, at least one biological or adoptive parent of the child has not had that parent's parental rights terminated;
> (2) the grandparent requesting possession of or access to the child overcomes the presumption that a parent acts in the best interest of the child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being; and
> (3) the grandparent requesting possession of or access to the child is a parent of a parent of the child and that parent of the child:
> (A) has been incarcerated in jail or prison during the three-month period preceding the filing of the petition;
> (B) has been found by a court to be incompetent
> (C) is dead; or
> (D) does not have actual or court-ordered possession of or access to the child." Tex. Fam. Code §153.433.

If the statute either facially, or as applied to the facts of the specific case, does not require the inclusion of all three elements, then it is unconstitutional. In the *Derzaph* case, this Court found that the grandparent failed to meet at least one of those requirements. *In re Derzaph*, 219 S.W.3d at 334. The facts in the case at bar are similar, but less compelling. Pemberton failed to prove any of the element and to overcome the "high threshold." *In re Derzaph*, 219 S.W.3d at 334. Yet, the

ruling in this case was in direct contradiction to the holding in *Troxel v. Granville*, and therefore, *Derzaph*, as well . *Troxel v. Granville*, 530 U. S. 57; 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *In re Derzaph*, *Id.*

A. There was no allegation or evidence that Scheller was an unfit parent.

Unless and until a court determines that the parent is unfit, the trial court lacks authority to interject itself or authorize a third party to interject itself into the decision making process. *Troxel*, 530 U. S. At 68; *In re Mays-Hooper*, 189 S.W.3d at 778. " A court may not lightly interfere with child-rearing decisions" made by a fit parent "simply because a 'better decision' may have been made. *In re Derzaph*, 219 S.W.3d 327, 334 (Tex. 2007). Even the mere filing of this lawsuit is an interference which burdens the fundamental rights of parents. *Troxel*, 57 U. S. at 58.

The portion of the statute which Pemberton relied on for standing to file the suit, Section 153.433 (3) (C) of the Texas Family Code is unconstitutional as applied to the facts of this case. Tex. Fam. Code §153.433 (3) (C). " Standing is a constitutional prerequisite to maintaining a lawsuit". *In re M.K.S.*, 294 S.W.3d 341 (Tex. App. – Dallas 2009); *see also Tex. Assn' of Bus. v. Tex. Air Control Bd.*, 852 S.W. 2d 440, 443-44 (Tex. 1993); *In re M.P.B.*, 257 S.W.3d 804, 808 (Tex. App. – Dallas 2008, no pet.). "A party's standing to pursue a cause of action is reviewed de novo." *In re Smith*, 262 S.W.3d 463 (Tex. App. - Beaumont 2008).

Neither the *Derzaph* case or the *Mays-Hooper* case speak directly to this point, even thought both cases involved fit parents. *In re Derzaph*, 219 S.W.3d 327 (Tex. 2007); *In re Mays-Hooper*, 189 S.W.3d at 777 (Tex. 2006) (per curiam). However, it does not appear

that the fit parent in either case questioned the grandparent's ability to even file the suit , when if the responding parent was a fit parent and the opinions do not reference a Motion to Dismiss.

There is nothing inherent in the list of grandparents that are entitled to seek access that would indicate that the responding parent in that situation would always be unfit. The Legislature could have chosen to list grandparents who would always meet the criteria, such as a grandparent who's child was intentionally murdered by the other parent. However, given the facts of a particular case, one could even envision a scenario where at the time of litigation, the parent was redeemed and functioning as a fit parent. Just because one of the parents is deceased for example, as in this case, it does not mean automatically mean that the remaining parent is unfit. Nor does it automatically mean that the petitioning grandparent is a fit parent or grandparent. Nor does it automatically mean that the deceased parent would want the type of visitation the grandparent is requesting. Scheller testified in this case, that during her life, his first wife limited visits and did not trust Pemberton or his wife. (R.R. page 157, lines 8-19, page 158, lines 6-11; page 167, line 24 - page 168, line 4; page 174, line 24 - page 175, line 12). Interestingly, the statute does not require the grandparent to be a "fit" parent or grandparent in order to assert these legislatively created rights.

The plain language of the statue also does not specifically mention that the responding parent must be unfit for the case to proceed. "When possible we interpret legislative enactments in a manner to avoid constitutional infirmities. *Barshop v. Medina County*,

925 S.W.2 at 629. In this case, that means interpreting the statute in accordance with the principles dictated by the *Troxel* Court. *See*, *Troxel v. Granville*, 530 U. S. 57; 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).
In addition, because the statute is designed to allow interference with a fundamental liberty, the State must show a compelling interest that needs to be protected. *In re Pensom*, 126 S.W.3d 251, 256 (Tex. App. – San Antonio 2003, orig. proceeding). *In re Pensom*, 126 S.W.3d at 254.

An unfit parent is a parent who does not adequately provide for the child. *Troxel*, 530 U. S. At 68; *In re Mays-Hooper*, 189 S.W.3d at 778. Pemberton made no such allegations in his pleading. *See* Appendix B. Nor was there any evidence presented that Scheller was an unfit parent.

The Pembertons' complaints centered around the fact that Scheller was limiting their access to the children and their belief that Scheller's new wife was trying to "get all of the vestiges of Amanda out of the children's life", including them. (R.R. page 28, lines 24 - 25; page 32, line 20 - page 33, line 11; page 35, lines 16 -19). There was also some evidence that Pembertons paid for daycare and watched the children when Scheller needed to do things. (R.R. page 8, line 21 - page 27, line 5). Nevertheless, the fact that the grandparent provides some care of other necessities for the child, does not prove that the parent is unfit. *In re Derzaph*, 219 S.W.3d at 329.

Pemberton also testified that Scheller had a temporary breakdown after the death of his wife, but that Scheller had asked friends to care for the children for a few days when he was hospitalized and had successfully recovered. (R.R. page 27, line 22 - page

28, line 6). This Court has previously held that hospitalization for mental health issues does not in itself render a parent unfit or unable to adequately care for her child. See *Lewelling v. Lewelling*, 796 S.W.2d 164 (Tex. 1990). Pemberton did not allege or prove that Scheller had failed to provide adequate care for the children at that or any other time.

Having failed to prove Scheller an unfit parent, Pemberton did not have standing. Therefore, the trial court did not have jurisdiction to enter any order in regard to Scheller and his children.

B. There was no evidence that Scheller intended to completely exclude Pemberton's access to the children.

"An order granting grandparent visitation cannot survive the holding in *Troxel* if there is no evidence that the parent intended to completely exclude the grandparent's access." *In the Interest of J. M. T., a Child*, 280 S.W.3d 490, 493 (Tex. App. – Eastland 2009; no pet.); (*citing In re Mays-Hooper*, 189 S.W.3d at 778). The record in the case at bar is clear: Scheller intends to provide Pemberton access to the children. (R.R. page 169, lines 7-19). Pemberton himself acknowledged that he is free to visit in Austin and without the presence of his wife, Judy Pemberton. (R.R. page 53, line 23 - page 54, line 5). The only denial of total access was to Judy Pemberton, who is not the biological grandmother of the children and, therefore, is not entitled to possession of or access to the children. *In re Derzaph*, 261 S.W.3d at 332.

Pemberton refused to visit in the manner that Scheller had determined to be in the best interest of the children. Instead, he appeared at the Scheller's front door with Judy Pemberton, demanded entry into

Scheller's home to see the children, and allowed his wife to cause a scene, when his demands were not met. (R.R. page 36, line 21 - page 37, line 5; page 52, line 20 - page 53, line 4; page 103, lines 3 -21; page 115, line 18 - page 116, line 5; page 164, line 16 - page 166, line 18). Scheller admitted that he was angry and not ready to return Pemberton's calls in the week immediately following the traumatic confrontation at his home by Pemberton and his wife on July 26, 2009. (R.R. page174, lines 2-8). It is also undisputed that was also no contact in the two months between the filing of the lawsuit August 13, 2009 and the hearing on temporary orders on October 12, 2009. *Appendix C and B.* Scheller did attempt to call Pemberton and Pemberton responded with a threat regarding the cost of the litigation. (R.R. page 174, lines 8-21).
Pemberton was not denied all visitation with the children. He simply was unhappy with the terms.

Further, the fact that Scheller has set conditions for visitation does not mean that he has denied Pemberton access. In the *Troxel* case, the mother made a decision that it was no longer in her children's best interest to see the Troxels on a "regular basis" and decreased the visits to one short visit per month. *Troxel*, 57 U.S. at 60-61. Supervising or in some other manner restricting the actual visits is not a denial of access. *In re J. P. C.*, 261 S.W.3d 334 (Tex. App.– Fort Worth 2008, no pet.).

Pemberton also testified that he believed he would not be able to gain access to the children without a court order. (R.R. page 47, lines 14-17). After reviewing the evidence presented, even that presented by Pemberton himself as to the events that led up to the filing of the lawsuit, it is understandable

that he might have that fear. When Judy Pemberton arrived on July 10, 2009, to pick up the girls for a week long visit, she was angry and verbally berated Scheller. (R.R. page 163 , lines 3-10; page 203, lines 14-16). On July 17, 2009, while returning the children, Judy Pemberton trespassed into the house, called Silvia Scheller a name, and began screaming at her about a recorder that had belonged to Ann Pemberton, the children's biological grandmother. (R.R. page 207, lines 13-25). On July 26, 2009, Pemberton testified that he brought his wife to Scheller's home, without so much as a telephone call, and demanded to see the children. (R.R. page 36, line 21 - page 37, line 5). He and others also testified that Pemberton did nothing to stop his wife as she pushed her way into the house, raised her voice and cussed. (R.R. page 52, line 20 - page 53, line 4; page 103, lines 3 -21; page 115, line 18 - page 116, line 5; page 164, line 16 - page 166, line 18). During a meeting between the Pembertons and the Schellers at Schlotzky's later that day, Judy Pemberton began screaming, followed Scheller to the parking lot, and held on to the handle of Scheller's car door to keep him from leaving. (R.R. page 168, lines 8-21). If that level of conflict had occurred in the context of a divorce, the Pembertons would likely find themselves punished with a Protective Order, rather than rewarded with an order granting everyone of their requests, and then some. Nevertheless, the grandparents of *J. P. C.* expressed the same fear, but were denied relief. *In re J. P. C.*, 261 at 338. Thus, Pemberton's "fear" that he might be denied all access was an insufficient reason to award him temporary possession of and access to the children.

Without evidence that Scheller intended to deny all access to Pemberton, the application of the statute is unconstitutional. Therefore, the trial court did not have jurisdiction to enter any order in this case.

C. There was no evidence to prove that the denial of possession of or access to the children would significantly impair the children's physical health or emotional well-being.

"The trial court has no discretion in applying the law to the facts of a case." *In re Derzapf*, 219 S.W.3d 327, 333 (Tex. 2007). If this Court finds that the trial court did have jurisdiction to proceed, the temporary order must still be reversed and the case dismissed, because the trial court abused its discretion in finding that Pemberton had "overcome the presumption "that a parent acts in the best interest of the parent's child." *Id*; Troxel, 57 U.S. at 68.

Section 153.433 of the Texas Family Code states in relevant part,

> "(2) The grandparent requesting possession of or access to the child overcomes the presumption that a parent acts in the best interest of the child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being."

Tex. Fam. Code §153.433 (2). It is a "high threshold." *In re Derzaph*, 219 S.W.3d at 334. It most certainly requires more than have a certain number of witnesses repeating or giving assent to the words, "significant impairment", like a magic spell, to produce the desired results. It would also, by necessity imply more than a mere showing of a change in what the

grandparent believes has been the previous pattern or schedule of visitation.

The Legislature chose to use that language that is identical to or virtually identical to language in other statutory provisions:

> " (a) Subject to the prohibition in Section 153.004, unless the court finds that the appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development". Tex. Fam. Code §153.131(a).
>
> "(b) While a suit for modification is pending, the court may not render a temporary order that has the effect of changing the designation of the person who has the exclusive right to designate the primary residence of the child .....
>
> > (1) the order is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development....". Tex. Fam. Code §156.006 (b) (1)
>
> "(a) .... may file and original suit requesting managing conservatorship if there is no satisfactory proof to the court that:
>
> > (1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development;...."
>
> "(b) .....if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint

managing conservators would significantly impair the child's physical health or emotional development". Tex. Fam. Code §102.004 (a) (b).

That language had been previously interpreted by this Court and various appellate courts to have certain meanings. In the case of *Lewelling v. Lewelling*, this Honorable Court held, "While trial courts should be afforded broad discretion in deciding family law question, the legislature has explicitly limited the exercise of that discretion when a nonparent seeks appointment as a managing conservator." *Lewelling v. Lewelling*, 796 S.W.2d 164 (Tex. 1990) (discussing Tex. Family Code § 14.01 (b) (Vernon Supp.1990) re-codified as Tex. Family Code 153.131 (a)). In order to prove significant impairment to the child, "the nonparent must offer evidence of specific actions or omission of the parent." *Lewelling v. Lewelling*, 796 S.W.2d at 167. "The nonparent must usually present evidence affirmatively showing conduct of the parent which will have a detrimental effect upon the child, such as physical abuse, severe neglect, abandonment, drug or alcohol abuse or very immoral behavior on the part of the parent. *May v. May*, 829 S.W.2d 373, 377-78 (Tex. App. – Corpus Christi 1992, writ denied); see also *Taylor v. Taylor*, 254 S.W.3d527, 536-37 (Tex. App. – Houston [1st Dist.] 2008, no pet.), (parent was physically violent, favored girlfriend's children, and refused to seek help for the child after learning the child was possibly sexually abused; the children were raised primarily by the grandparents); *In re C.R.T*, 61 S.W.3d 62, 68 (Tex. App. — Amarillo, 2001, pet. denied). *In re R.D.U.*, 51 S.W.3d 314, 231 (Tex. App. – Houston [1st Dist.] 2001, pet. denied), (parent had a drug problem, failed to

support her children, and was irresponsible); *In re R.D.Y.*, 51 S.W.3d 314, 321 (Tex. App. – Houston [1st Dist.] 2001, pet. denied); (parent physically abused the child); *Thomas v. Thomas*, 852 S.W.2d 31, 36 (Tex. App. – Waco 1993, no writ), (father left the child with the mother, whom he knew to have an unstable lifestyle, had no contact with the child for over three years, wholly abandoning her, and failed to provide any support during that same period of time); *Ray v. Burns*, 832 S.W.2d 431, 433-434 (Tex. App. – Waco 1992, no writ); (parent's lifestyle was unstable, disorganized, and chaotic). ***O'Connor's Texas Family Law Handbook*** 419-20 (2010). These fact scenarios are similar to those found in successful termination cases.

Further, the type of evidence that might ordinarily support a finding of best interest is often not sufficient to support a finding of significant impairment. In the *Lewelling* case, this Court held that evidence of the mother's unemployment, crowded living conditions, past mental health issues, and passively allowing her self to be the victim of domestic violence was not sufficient to show that the children would be significantly impaired. *Id.* Based on this ruling several appellate courts have found that circumstances that might ordinarily support a finding of best interest were insufficient to support a finding of significant impairment. *In re S.W.H*, 72 S.W.3d 772 (Tex. App. – Fort Worth 2002, no pet.), (mother's previous, severe drug addiction, which lead to her incarceration, causing her to be absent from the child for a period of time, was insufficient); *In re W.G.W.*, 812 S.W.2d 409, 419-415 (Tex. App. – Houston [1st Dist.] 1991, no writ), (mother moved several times,

entertained men in the home while the child was present, brandished a fire poker in front of the child, tried to stab the nonparent in front of the child, with whom she and the child had lived for a period of time, and the child referred to the nonparent as "Daddy'); ***O'Connor's Texas Family Law Handbook*** 420 (2010).

In the *De La Pena* case, the El Paso court found that the aunt had failed to prove significant impairment, despite the evidence that :

"* the child had resided with the nonparents since the day after her birth and had visited with the father only twice since her birth;

* the child experienced serious sleep disorders and regressive behavior following the two visits with her father;

* the child had bonded with the nonparents other daughter, who she considered her little sister;

*expert witnesses testified that removing the child from the nonparents' home would be "devastating," "very traumatic," and likened it to "psychological amputation";

*the father had scheduled a visit and failed to show up;

* it was the paternal grandmother and not the father who telephoned the nonparents, bought, wrapped, and addressed the cards and presents sent to the child; and

* the father failed to return the telephone calls of the nonparents." *In re De La Pena*, 999 S.W.2d 521, 528 (Tex. App. – El Paso 1999, no pet.). He also spent the night with the child at the home of his step-father, who was a known child molester. *In re De La Pena*, 999 S.W.2d at 533.

If these types of allegations did not amount to a significant impairment to the children involved, then clearly an inability to attend a specific church or eat Thomson Bar-B-Que will not meet the criteria. (R.R. p. 152, lines 1-14; page 80, lines 17-18; page 140, lines 1-3). To the contrary, all of the evidence presented by Pemberton on this issue was of the same nature that this and other courts have previously held to be insufficient.

Only the Pembertons and their friends testified, in response to questions that tracked the statute, that the denial of access would significantly impair the physical or emotional well-being of the children. In the case of *J. P. C.*, the Fort Worth Court of Appeals held that the probative evidence necessary to prevail would require more than the "bare, unsupported allegations". *In re J. P. C.*, 261 S.W.3d at 338. Even the expert testimony of the psychologist, in *Derzaph*, that it might be harmful to one of the children and that it was in the best interest of all of the children to have some contact with the grandparents was insufficient to award the grandmother access over the father's objection. *In re Derzaph*, 219 S.W.3d at 334. Clearly the unqualified conclusions of Pemberton's witnesses were not sufficient.

Pemberton also claimed that the restrictions and limitations placed on the contact between himself and the children, would cause the children harm. When asked what he observed that led him to that conclusion, he stated that the children seemed more distant and hesitant in the presence of their step-mother. (R.R. page 41, line 17 - page 42, line 11). His testimony was almost identical to that of the grandmother in the *J. P. C.* case. *In re J. P. C.*, 261

S.W.3d 334 (Tex. App. – Forth Worth 2009, no pet.). In that case, the grandparents testified that the mother's supervision of their visits, caused the child discomfort, that he acted differently, and appeared inhibited, pensive, and superficial when the mother was present. *Id* at 337-338. Although the Court did not state what type of behavior was would be evidence of significant impairment, it is reasonable to assume that it would require something more substantial. *Id.*

In the *Derzaph* case, the grandmother presented evidence regarding the anticipated effect on the children, if they were denied access to her husband and other family members. This Court found that the biological grandmother had the burden to prove "that denying the children access to her in particular - not Connie and Randy jointly or the Johnson family as a whole - would significantly impair the children's physical health well-being to suffer." *In re Derzaph*, 219 S.W.3d at 333. A good deal of the testimony in this case was centered around the time the children spent with the step-grandmother or involved in activities, rather than with Pemberton himself. (R.R. page 21, lines 14 -20; page 22, lines 4-7, 16-19; page 44, line 6 - page 45, line 1; page 57, line 10 - page 58, line 24; page 68, line 21 - page 71, line 10; page 79, line 3- page 80, line 18; page 88, lines 14-16; page 88, line 24 - page 89, line 7; page 112, lines 8-11, line 17 - page 113, line 15; page 126, lines 3-13; page 132, lines 11 - 24; page 140, lines 1-3; page 149, lines 9-15;). There was also testimony that Pemberton himself did not take vacation in order to spend time with the girls. (R.R. page 124, line 123- page 125, line 1). He met them for lunch and came home for dinner. (R.R. page 22, lines 20 -24). When asked whether he had taken a

five day hunting trip during one of the children's visits to Crockett, Judy Pemberton was unable to recall. (Page120, line 24 - 121, line 2). On at least one occasion Pemberton was out of town, while Scheller and the children visited only with the step-grandmother. (R.R. page 99, line 25 - page 100, line 3). The testimony of Pemberton's witnesses focused on the relationships and activities they would miss, if they were unable to visit in Crockett. (R.R. page 22, lines 11-24, page 44, line 6 - page 45, line 1; page 80, lines 4- 18; page 113, lines 1-15; page 136, line 18- page 137, line 3; page 151, line 15 - page 152, line 14). Pemberton, failed in his burden to overcome the statutory presumption that denying the access to him in particular, would significantly impair the children's physical health or emotional well-being.

In the case of *Whitwell v. Whitwell*, the grandparents failed to prove that the disabled child would be significantly impaired if the mother was allowed to take him from the United States, where they lived, to live with her in Australia. *Whitwell v. Whitwell*, 878 S.W.2d 221 (Tex. App. – El Paso 1994, no writ). Obviously, requiring Pemberton to come to Austin, Texas from Crockett, Texas, will not rise to the level of significant impairment.

Pemberton also speculated that the children might be why they had not seen him for a while was not sufficient to over the presumption. (R.R. page 36, lines 15 -20). Questions, "are not evidence of significant impairment. *In re J. P. C.*, 261 S.W.3d at 339.

Significantly, no one testified that to any actual harm that had occurred to the children as a result of the change in visitation schedule, but only to

speculations as to what might occur in the future. Pemberton will argue that he introduced some evidence of anger and emotional suffering of the children. None of it, however, is relevant to the statutory burden. He presented evidence that one of the children was angry because of the death of her mother, her uncle, and her biological maternal grandmother. (R. R. page 17 - page 73, line 9). The sudden heart attack that killed the child's mother was not the result of an act or an omission by Scheller. (R.R. page 16, lines 1-13). Nor was any evidence produced that he was in anyway responsible for the death of his mother-in-law or the suicide of his brother-in-law, Pemberton's son. (R.R. page 18, lines 10-16). In addition, Pemberton's wife testified that Scheller had obtained counseling for the child from the school counselor and had done well. (R. R.. page 130, lines 12-18). Pemberton also presented evidence regarding a bed-wetting incident that occurred around November of 2008, at approximately the same time Scheller's current wife moved into the home with him and the children. (R.R. page 41, lines 6- 13; page71, line 11 -15). Again, there was no evidence that Scheller caused this behavior. More importantly there was no correlation between the behavior and the changes made to Pemberton's access to the children, which were instituted until July of 2009, nearly seven months after the event.

The link between the parent's conduct and harm to the child may not be based on evidence which merely raises a surmise or speculation of possible harm. *Brook v. Brook*, 881 S.W.2d 297, 298 (Tex. 1994). "'Close calls" go to the parent in an evidentiary review". *Ray v. Burns*, 832 S.W.2d

431, 433 (Tex. App. – Waco 1992, no writ).

Having no evidence as to how specifically the denial of access by Pemberton would significantly impair the physical or emotional well being of the children, the trial court abused its discretion in awarding Pemberton access to the children contrary to the wishes of Scheller. "A trial court abuses its discretion when it grants access to a grandparent who has not met this standard." *In re Derzaph*, 219 S.W.3d at 333.

D. The trial court abused its discretion by failing to give deference to Scheller's wishes in its orders.

Even, if the trial court had jurisdiction to enter a the temporary orders, it was still an abuse of discretion to do so without deference to Scheller's preferences. *In re Mays-Hooper*, 189 S.W.3d at 778.

The trial court was obliged to defer to the decisions of Scheller, but failed to do so. As applied to the facts in this case, the application of Section 153.433 of the Texas Family Code as the basis for the award to Pemberton of possession and access to the children was unconstitutional. Tex. Fam. Code §153.433

Issue 2: The trial court abused its discretion in appointing an expert to evaluate the parties and requiring Scheller to follow her recommendations.

Since the trial court did not have jurisdiction to proceed with the case, it did not have jurisdiction to exercise its discretion in regard to either 153.010 or 105.001. Tex. Fam. Code §§ 153.010 and 105.001.

Again, the analysis must be the same based on the holdings and reasoning in *Troxel*. *See Troxel v. Granville*, 530 U. S. 57 (2000). The particular issue disputed in *Troxel* was that of grandparent access. *Id.* The Supreme Court held that the "liberty interest in this case - the interest of parents in the care, custody, and control of their children - is perhaps the oldest of the fundamental liberty interest recognized by this Court." *Troxel* 530 U. S. At 65; citing *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) ('includes the right of parents to "establish a home and bring up children" and "to control the education of their own.'"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925) ('"liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control."..... " and to recognized and prepare him for additional obligations.'"); *Prince v. Massachusetts*, 321 U. S. 158 (1944) ("right of parents to direct the upbringing of their children).

Certainly, the appointment of the psychologist in this case was, if possible, even more invasive than the actual possession order. Under the guise of a guardian ad litem, not only was her purpose to gather evidence:

> " The Court appoints Dr. Allison Wilcox, Ph. D., as the court appointed expert in this matter, to serve as the independent Guardian Ad Litem for the children, as well as the psychological expert to evaluate the circumstances surrounding the relationship between the Petitioner, Respondent, and the children, and to make recommendations to the court regarding whether denial of possession and access to the children by Petitioner would significantly

impair their physical health or emotional well-being." *Appendix B.* page 6,

but she was also given authority to make decisions in place of Scheller:

> "IT IS FURTHER ORDERED that the parties and their agents, servants and representatives shall follow the recommendations of Dr. Wilcox.....
>
> IT IS ORDERED that the parties shall work with Dr. Wilcox regarding setting appropriate guidelines and boundaries for issues that arise during the periods of possession and access." *Appendix B.* page 6.

Pemberton claimed in his response that the appointment of the psychologist was justified pursuant to Section 153.010 of the Texas Family Code. Tex. Fam. Code §153.010.

> "(a) if the court finds at the time of a hearing that the parties have a history of conflict in resolving an issue of conservatorship or possession of or access to the child, the court may order a party to:
>
> (1) participate in counseling with a mental health professional who: ...".

Tex. Fam. Code §153.010.

Although the psychologist was not directly ordered to counsel with the parties, given the broad authority delegated to her by the trial court: "... shall follow all recommendations of Dr. Wilcox," it is feasible that Scheller might be required to undergo counseling with Dr. Wilcox. *Appendix B.* page 6.

Pemberton additionally claims that Section 105.001 of the Texas Family Code supports the appointment of the psychologist. Tex. Fam. Code

§105.001. In relevant part, that statute reads:

> (a) The Court may make a temporary order, including the modification of a prior temporary order, for the safety and welfare of the child..."

Tex. Fam. Code §105.001.

"While [Fam. Code] §11.11 does give trial courts broad powers in family cases, it does not authorize them to invade constitutional guarantees. *Grigsby v. Coker*, 904 S.W.2d 619, 621 (Tex. 1995); Tex. Fam. Code §11.11 currently §105.001. Accordingly, the process of review would be the same as in the preceding issue.

Pemberton did not prove or even allege that Scheller was an unfit parent. *Appendix C.* Having failed to do so, the trial court had no jurisdiction to enter any order on the issue. If the trial court did have jurisdiction to enter the order, then analysis continues in the same fashion.

Scheller himself specifically testified that he did not believe that there was any reason to appoint an expert. (R.R. page 192, lines 11-12). Even if, as Pemberton argues, Scheller had initially agreed to the appointment, that would not forever waive his right to object. It was clear that during the trial, he did not really understand what he was being asked to determine. (R.R. page 191, line 19 - page 192, line 24). As a fit parent, he not only has the right, but the obligation to correct a decision he later learns could negatively affect his children.

Pemberton again had the burden to overcome the presumption that a fit parent acts in the best interest of his or child. *In re Derzapf*, 219 S.W.3d at 333; *Troxel*, 57 U.S. at 68. Section 105.001, specifically allows for the entry of an order for

temporary conservatorship of the child, even in a modification. Tex. Fam. Code §105.001. Yet, the broad language in Section 105.001 of the Texas Family Code must be interpreted in the context of the specific statutory limitations placed on the trial judge's authority in Section 156.006 (b) to temporarily change the designation of the person who has the right to designate the primary residence of the child. Tex. Fam. Code §§ 105.001 and 156.006 (b). In the same manner, that same broad language must be interpreted to conform with the constitutional principles regarding the state's interference with Scheller's fundamental liberty interest in the care, custody, and control of his children. *See Troxel*, 57 U.S. at 65.

Further, there was no evidence that this appointment was necessary to protect the safety and welfare of either child, as required in the plain language of the statute. Tex. Fam. Code §105.001. In fact, the trial judge stated the purpose of the appointment was to evaluate the circumstances surrounding the relationship between Pemberton and the children and Pemberton and Scheller; and to make recommendations to the Court as to whether the denial of access is warranted, would significantly impair their physical health and emotional well-being. (R.R. page 233, lines 10 -17); *Appendix B*, page 6.

Scheller was already providing counseling for the older child. The younger child was not yet five at the time of the hearing. (R. R. page 14, line 24). Judy Pemberton told the judge, that the older child had received counseling for the loss of her mother from a school counselor, who did "very well." (R.R. page 130, lines 12-18). Scheller testified that they were still

using the school counselor at the time of the hearing. (R. R. page 194, lines 18-22). He described how well the children were doing. (R. R. page 195, lines 6-15). He also told the judge that the older child was just beginning therapy and his reasoning behind that decision. (R.R. page 197, line 14 - 200, line 13). The trial judge had no authority to substitute his judgment for that of Scheller's. *See, In re Derzaph*, 219 S.W.3d 327 (Tex. 2007). Nevertheless, the trial court ignored Scheller's decision on the matter and appointed an expert witness, hand-picked by Pemberton, based on the "testimony" of Pemberton's attorney, to meet Pemberton's request. (R.R. page 24, lines 7-23). *Appendix B,* page 6. Once again, the decisions of Scheller, a fit parent, were given no deference.

Having failed to prove Scheller unfit, the judgment of the court, the grandparent, or even a psychologist, cannot be substituted for that of the parent. *In re Derzaph*, 219 S.W.3d 327 (Tex. 2007); *In re Karen Mays-Hooper*, 189 S.W.3d 777 (Tex. 2006). Pemberton filed this suit without having sufficient evidence to meet his burden of proof. He should not now be allowed to use the suit to launch an fishing expedition in the hopes of obtaining the evidence he needs to prevail on the merits.

Issue 3: Mandamus is the appropriate remedy in this case.

A party is entitled to mandamus relief if a trial court violates a legal duty or abuses its discretion, and the party has no adequate remedy by appeal. *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992). Pemberton's failure to meet the constitutional and statutory burdens required to interfere with Scheller's fundamental right to make child rearing decisions

deprived the trial judge of jurisdiction to issue any order in this case.

This Court has previously held the remedy by appeal to be inadequate in a case where the relator challenged subject matter jurisdiction to enter a temporary order, because temporary orders are not subject to appeal. *Little v. Daggett*, 858 S.W.2d 368, 369 (Tex. 1993); *See also, Dancy v. Daggett*, 815 S.W.2d 548 (Tex. 1991). Specifically, and more recently, this Honorable Court granted mandamus relief to require a trial court to vacate its temporary orders granting grandparent access. *In re Derzapf*, 219 S.W.3d 327 (Tex. 2007); *In re Mays-Hooper*, 189 S.W.3d 777. In both instances, this Court found that the temporary orders allowing grandparent access, divested a fit parent of possession of his child and, therefore, violates the holding of the United State Supreme Court in *Troxel v. Granville. Troxel*, 530 U. S. 57 (2000); *In re Derzapf*, 219 S.W.3d at 334; See *In re Mays-Hooper*, 189 S.W.3d 777.

Even more offensive is the appointment of the expert witness. By virtue of the temporary order, Scheller's privacy is at the mercy of the psychologist, upon penalty of contempt. Further, each day that the order remains in effect, the psychologist has the authority to not only interfere with Scheller's right to make decisions for his children, but to totally usurp that power. *Appendix B.* Scheller will suffer irreparable harm, if forced to continue living under the order.

As in Derzaph, the temporary orders in this case were entered" in violation of the Troxel's cardinal principle and without overcoming the statutory presumption that the father is acting in his children's

best interest". *In re Derzaph*, 291 S.W.3d at 335. For the same reasons the effects of this temporary order are "irremediable and mandamus relief is appropriate." *Id.*

Failure to grant mandamus relief will subject Scheller and his family to suffer the unjust interference by the court and Pemberton for months and even years. In the meantime, other nonparents will be emboldened to file frivolous lawsuits, with little or no competent evidence.

CONCLUSION

This case is about control. The children's mother had been very careful about the Pembertons' access to the children and the Pembertons were afraid that it would happen again. (R.R. lines 5-12). Each of his requests were designed to meet his needs and not those of the children. Pemberton was not satisfied with the type of access that Pemberton was willing to allow, and so based on nothing more than the untimely and tragic death of his daughter, he enlisted the authority of the trial court to force Scheller into submitting to his demands, she herself may not have authorized. (R.R. lines 5-12).

Pemberton testified that he was unable to take off a month or two just to spend time with his granddaughters. (R.R. page 22, lines 16-19). When the children visit in Crockett, they actually spend their time with the step-grandmother, until he gets home from work at 6:00 p.m., depending on his schedule, or during lunch. (R.R. page 22, lines 20 -24; page 124, line 23- page 125, line 1). He was willing to miss work to come to Austin in order litigate and to meet with the expert he was requesting be appointed. (R.R. page 45, lines 11-14). Yet, he

was unwilling to come to Austin in order to see his grandchildren. He asked for and received a possession and access schedule that accommodated his needs.

Pemberton failed to prove that the children would suffer any significant impairment if he were required to honor the decisions of Scheller in regard to when and how he would be allowed to visit the children. In the hopes of curing this defect before a final hearing on the merits, he asked for and received an expert trial witness, clothed in the dual role of guardian ad litem.

The United States Supreme Court explained the historical recognition of importance of the fundamental right of parents to make decisions concerning the care, custody, and control of their children and the applicability of that rule of law to the states through the Due Process Clause of the Fourteenth Amendment. *Troxel*, 57 U. S. at 65, 66. Texas has followed those precedents, most recently affirming the principles detailed in Troxel in two cases nearly identical to this case. *See In re Derzaph*, 219 S.W.3d 327 (2007); *In re Mays-Hooper*, 189 S.W.3d 777 (2006). As a fit parent, Scheller was entitled to protection by the court from this type of interference. Instead the trial court aided and abetted the interference by rendering temporary orders without any reference or compliance with well-settled, guiding principles of law.

In pursuing his own agenda, Pemberton ignores the harm caused to the children by the lawsuit itself. Litigation burdens a parent's right. *Troxel*, 530 U.S. at 58. Logically, if the parent is impeded in performing his parental roles by burdens imposed by nonparents, the unity and structure of the institution designed to

care for children, the family, is burdened. Court rulings are the climax of a long and arduous process. During that process the parent, and consequently the entire family unit remains under scrutiny and attack, by virtue of the restrictions imposed by temporary orders and the demands of litigation. Such burden can only detract from the parent's ultimate goal of providing the security and nurturing that children deserve to receive from their families.

Some of the effects are tangible and obvious. Pemberton's threatening predictions that it was going to cost both himself and Scheller " a lot of money in lawyer's fees" was accurate. Money consumed by litigation is no longer available to benefit the children. Pemberton knew that Scheller was already stressed out at work, the source of provision for the children. (R.R. page 38, lines 18-20). Without concern as to how it would affectfor the affect on the children, Pemberton chose to add to that stress by filing a lawsuit, less than two weeks after his unreasonable demands were not met. *Appendix C.*

More devastating are the intangible effects. Traditionally, the law has favored the parent as the ultimate authority for the child. Parents provide structure and set boundaries, which give children a sense of security. If that authority is subject to challenge by a grandparent or any other nonparent in the absence of acts or omissions on the part of the parent that expose the child to harm, then the child's faith in the authority of the parent is jeopardized and all authority becomes subject to challenge. The state most certainly has a compelling interest in a citizenry that recognizes the exercise of appropriate authority.

An additional danger in allowing this type of suit to linger without strict adherence to the rule of

law, is the chilling effect that it will have on familial relationships. Grandparents, especially, are often are more financially capable of maintaining a lawsuit than parents. If they are allowed to bully parents into submitting to their demands by draining the financial and emotional resources of that parent through litigation, without meeting the necessary burdens of proof, parents are going to be afraid to let their children have any contact with the grandparents or anyone else the Legislature might one decide deserves standing.

The holding in *Troxel* can be paraphrased to say that nonparents and the state should not be second guessing a fit parent. *See Troxel*, 530 U. S. 57 (2000). That is exactly what has happened in this case. As in the *Mays-Hooper* case, there is no reason to remand this case for further proceedings on these issues because "the facts are virtually the same", as those in *Troxel*. *Troxel*, U.S. 57 at 58; *In re Karen Mays-Hooper*, 189 S.W.3d at 778. In *Derzaph*, this Court held that mandamus review allowed "appellate courts to give needed and helpful direction to the law... and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *In re Derzaph*, 219 S.W.3d at 335. That relief is necessary in this case to protect Scheller's fundamental parental rights, the children's security and the public policy of this state.

PRAYER

WHEREFORE, Relator prays this Court grant this writ of mandamus. Relator further specifically requests this Court: (1) reverse the judgment of the trial court; (2) render a judgment denying Pemberton's

petition for possession of and access to the children; and (3) render a judgment denying Pemberton's petition for the appointment of an expert and guardian ad litem.

Respectfully submitted,

//S// _____

CECILIA M. WOOD
ATTORNEY AND COUNSELOR AT LAW, P. C.
1122 Colorado Street,
Suite 2301
Austin, Texas 78701
Telephone No.: 512-708-8783
Facsimile No.: 512-708-8993
State Bar No. 21885100
Attorney for Relator

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was delivered to the Honorable Leonard Saenz, Associate Judge for the 261st Judicial District Court, Travis County Courthouse, 1000 Guadalupe, Third Floor, Judge's Office, Austin, Texas 78701 by hand-delivery and to Mrs. JoAl Cannon Sheridan, Ausley, Algert, Robertson & Flores, L. L. P., 3307 Northland Drive, Suite 420, Austin, Texas 78731, by U. S. certified mail, return receipt requested, number 7008 1300 0000 2946 7544 on the on the 1st day of March, 2010, in accordance with the Texas Rules of Appellate Procedure.

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CECILIA M. WOOD
Attorney for Relator